COMPARATIVE

CRIMINAL JURISPRUDENCE.

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Vol. II.

CRIMINAL PROCEDURE.

THE INDIAN CODE OF CRIMINAL PROCEDURE,

ACT X OF 1882, AS AMENDED BY ACTS III OF 1884, X OF 1886, AND V OF 1887.

With Annotations from the Laws of other Countries.

BY

H. A. D. PHILLIPS,

BENGAL CIVIL SERVICE.

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INTRODUCTION.

It has been remarked that though the substantive penal law may be the perfection of reason and wisdom, yet the worst criminals may escape, owing to flaws and technicalities in the law of procedure. The Indian Code of Criminal Procedure has been framed with the express purpose of eliminating all possibilities of acquittal, except on the merits of the case (Chap. 45). No conviction is to be reversed on account of any error or irregularity, *unless a failure of justice has been occasioned thereby.** Article 1045 of the New York Code of Criminal Procedure is as follows:—"The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. The provisions of this Code and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice." To the same effect is Art. 4 of the Louisiana Penal Code. The Criminal Procedure Code of that State, framed by a distinguished lawyer and jurist, lays down seven objects, one of which is to abolish all forms, that produce vexation to the prosecution, to the accused, or to the witnesses. Another is to *take away from the guilty all hope of escape by a resort to formal or technical objections.* Article 3 states that "the great object of penal law being the prevention of offences by the example of punishment, the intent of all Codes of Procedure is to ensure this end; therefore, every system must be imperfect, which permits the form to defeat the substance of the law, and suffers a criminal *ever* to escape punishment from any defect of form in his prosecution." The rule as to strict construction of penal statutes doubtless originated in the extreme severity of punishments. As late as 1837 there were as many as 37 capital offences on the Statute-book; now there are but four—murder, treason, piracy by the law of nations, and setting fire to dock-yards. No wonder that prisoners were acquitted for paltry technical flaws, and that fatal "variances" were often found between the indictment and the fact proved. But *cessante ratione cessat et ipsa lex;* and the rule of strict construction should now be abolished. The swift and certain punishment of the guilty—and this constitutes the best means of prevention—is the object of criminal procedure. It is not only necessary that the "*antecedens scelestus*" should never escape, but for the diminution and prevention of crime, it is essential

* Ind. C. P. C., 537.

that he should be brought to justice swiftly, and not by a "*pede Pœna claudo.*"

English criminal procedure is eminently traditional in its character, and has been influenced by the constitutional history of the country. The Crown has frequently been opposed to the nation, and executive has been in conflict with judicial authority. Both under the Tudors and the Stuarts the acquittal of offenders, in the case of press and political offences in particular, was often desired by the community at large. The result has been perhaps to give accused persons, not merely a fair trial, but to show them indulgence and give them chances of escape. The Judges, when in conflict with the executive, have virtually been *judices in suâ re.* They have been held in check by no *droit administratif*, and administrative questions have been decided by them, and not, as on the continent, by administrative Courts. There has been no *Tribunal des conflits* to determine what matters are for administrative, and what for judicial, authority. Had there been a *Tribunal des conflits*, the cases of general warrants, *inter alia*, would probably have been decided differently. A general search or inspection is allowed by the Indian Code of Criminal Procedure (96), and there was ample authority in England for general warrants. In the case of *Entinck* v. *Carrington*, Lord Camden, C. J., tries to get over the previous authorities by saying that he can find no other authority to justify a general search for the seizure of a libel than that of "Scroggs and his brethren." But Scroggs and Jefferies were only two out of the twelve constituted Judges of the land: and their decision was certainly in accordance with law and previous practice. In England, then, penal procedure has been intimately connected with the political, moral, and religious opinions of the people; while that of France has emanated purely from Governmental authority.

A divergence of origin has produced marked differences of system. Some of the characteristics of the French system of procedure are the following:—There is no grand jury, but in its place an examining Magistrate, clothed with extraordinary and despotic powers: the preliminary examination is secret, and no counsel for the defendant admitted at it; there is, as in most European States, at each Court of Justice an officer, specially appointed by Government for the prosecution of offences which have generally a public character, and the prosecution of which does not depend on the will of the injured party. The jury are not competent to decide in cases of delict (misdemeanour). There is no law of evidence, the decision being given according to moral conviction, as in those States in which the Prussian code of procedure is adopted. The decision of the jury is by a majority of voices; they do not give a verdict of guilty or not guilty, but

answer questions put by the President of the Court, their finding thus being analogous to a special verdict. A great want of confidence in the testimony of witnesses is also to be observed in their system of procedure, certain classes of persons are not allowed to bear witness, either on account of their relationship to one of the parties, or on account of their antecedents. Questions can only be put to them through the Judge. Special Police Courts exist in all the States of Europe, which give judgment in "contraventions" (mostly petty infractions of police and sanitary regulations), the characteristic of this grade of offence being that the mere violation of the law is punished, though there be no criminal intention. There is an appeal only from the decision of police and correctional Courts: from higher Courts there can only be *cassation* (revision) on the ground of a violation of the law.

Not only the English, but even the Indian Legislature (whose codes are in advance of the English criminal law) may derive many useful hints from the criminal procedure codes of other nations. I may briefly pass in review some of the points deserving of notice:—

1. In Germany certain infractions of fiscal laws can be tried by the administrative authorities, but the accused may appeal to higher administrative authority, or claim a judicial decision. In India we have some cognate instances, *e. g.*, in the case of certain infractions of the laws relating to Stamps, Forests, and Canal Revenue.

2. In some countries (*e. g.*, Ital. C. P. C., 102), doctors, surgeons, and other officers of health are bound to give information to the local judicial police of cases of serious bodily injury, wounds, poisonings, in which they have given the aid of their profession. There is no such legal obligation in India or England, except if homicide has been committed. So doctors and other experts are bound to give assistance at investigations.—Fr. C. P. C., 43; Cass., 6th Aug. 1836; Ital. C. P. C., 121—131.

3. In some countries certain high officials are exempt from appearance in Court. In Germany, for instance, the following persons are exempt, and must be examined at their offices or residences:—the Chancellor of the Empire, the Ministers of different States, the members of the Senate in free towns, the heads of superior departments, and the heads of ministries.—Germ. C. P. C., 49. It is a matter for consideration whether some such exemptions are not advisable in England or India. The Prince of Wales, a Secretary of State, the Lieutenant-Governor of a Province, should not be compelled to go into the witness-box.

4. In recent English Statutes some limitation is generally imposed for the prosecution of offences. On the continent generally the cognizance of all offences is prescribed by a certain

limitation, which varies according to the nature of the offence; and punishments are similarly prescribed. Both in England and India it is advisable that the law of limitation should be more extended to criminal offences. The maxim *nullum tempus occurrit regi* is obsolete.

5. In Germany, among the offences which cannot be prosecuted except on the complaint of the injured party, are included theft, misappropriation, and cheating committed to the prejudice of parents, relations, guardians, &c.—Germ. C. P. C., 151, 152. This appears to be a considerate provision of law. As a matter of practice in India (and I believe in England also) such offences, though non-compoundable, are often allowed to be withdrawn. The French law goes farther, and permits civil reparation only in such cases.—P. C., 380.

6. In India there is nothing to prevent a complainant, whose complaint of assault, insult, defamation, mischief, &c., has been dismissed by a competent Criminal Court, from bringing a suit on the same facts in the Civil Court. This should not be permitted. In Italy there can be no civil action, when it has been declared by the Criminal Court either that the act imputed does not constitute an offence, or that the accused did not commit it.—Ital. C. P. C., 4, 6. So, if a penal action is pending, a civil action must be suspended until the former has been decided. In France the rule has been laid down by the Court of Cassation as follows :—"The acquittal pronounced in a Criminal Court is only an obstacle to a civil action if the Criminal Judge has clearly negatived the fact which is the common basis of either action, and the civil claim is absolutely irreconcilable with the findings and decision of the Criminal Judge."—Cass., 20th April 1863. In India a complainant, who has been made to give compensation to the accused for bringing a vexatious complaint, might nevertheless go and file a suit in the Civil Court on the same facts. In England, in cases of assault and battery only, dismissed on the merits, the Justices must make out a certificate of such dismissal and give it to the party accused, and such certificate or the conviction (in case of conviction) is a bar to any other proceedings, civil or criminal, for the same cause.—24 and 25 Vict., c. 100, s. 45.

7. In England and India an accused cannot, as in certain continental countries, be tried in his absence. In England we find an approach to this procedure in summary proceedings before Justices. If the defendant does not appear in answer to a summons, the Justices may either issue a warrant *or hear the case in his absence*, and adjudicate as if he had appeared.—11 and 12 Vict., c. 43, s. 2. Whether judgment by default or contumacy should be allowed has been a keenly debated question among criminalists. French, Belgian and Italian legislators

have answered the question in the affirmative; but the German Code does not generally permit it. There are, however, exceptions. A trial can take place in the absence of the accused, when he is prosecuted for desertion from military service, or when the offence is punishable with fine only, with simple imprisonment not exceeding six weeks, or with confiscation.—Germ. C. P. C., 231. But if the accused has once appeared and been examined, and afterwards absconds, the trial can be concluded in his absence, no matter what the offence may be.—*Id.*, 230

8. In India and England there is no legal obligation on private doctors and surgeons to attend wounded persons or assist at the examination of corpses. On the continent such an obligation exists. In Germany the *post mortem* is made in the presence of a judicial officer by two doctors, one being a doctor attached to the Court.—Germ. P. C., 87, 88.

9. A study of foreign codes shows what offences it has been considered inadvisable to entrust to the decision of a jury. In India cases of homicide and offences against property are tried by jury in those districts where trial by jury is in force. It has been found that native juries are too prone to convict dacoits, previously convicted thieves, &c, whereas many murderers escape scot-free. The rule in England that the jury must be unanimous leads to the acquittal of many guilty persons. The general rule in continental countries is that a majority prevails: Where the numbers are equal, the accused gets the benefit of the doubt.—Ital. C. P. C., 492, 505; Fr. C. P. C., 347; Germ. C. O. J, 198. In Scotland the jury consists of fifteen, and a majority suffices —2 Hume, 308. In France a simple majority suffices for a verdict of extenuating circumstances; for aggravating circumstances a majority of two-thirds is necessary.

10. On the continent generally the accused must be defended. If accused has no defender, the Court appoints one for him. —Fr. C. P. C., 294; Ital. C. P. C., 275. In India, as in England (except in cases of treason), the prisoner is not entitled to have counsel assigned to him to defend him gratuitously. In Scotland. every prisoner, however poor, is entitled by Statute, 1587, c. 91, to have a counsel to defend him. In Germany, the accused must have a defender, if the offence be a crime, and he demands one; also if he be deaf or dumb, or under 16 years of age. Disciplinary punishments are inflicted on advocates who refuse to act, or do their duty in a careless or perfunctory manner.—Germ. C. P. C., 137—146. So in Italy.—C. P. C., 632—637.

11. The desirability of examining accused persons is no longer an open question. A bill has been introduced in England to make them competent witnesses in all cases. In India an accused can be questioned for the purpose of enabling him

to explain any circumstances appearing in the evidence against him.—342, C. P. C. In Louisiana the accused is told that he is not bound to answer, but that a departure from the truth, or a refusal to answer without assigning a sufficient reason, *must* operate as a circumstance against him.—P. C., 173. In several American States a defendant may testify in his own behalf, and may be cross-examined in full like any other witness. In Austria (179, C. P. C.) the accused is invited to answer clearly and truthfully. If he answers with cunning and either denies the accusation or affirms to be ignorant of the facts which are charged against him, the Judge must make known to him with "increasing energy" that a lie in presence of the evidence will not avail; and though promises, threats, force, or tricks are forbidden, he must with "decent earnestness" insist on his stating the truth. The examination of the accused is perhaps the most important part of the trial in France. There are several Statutes in England, under which accused are already competent witnesses, *e. g.*, the Mines Regulation Act, 1872, Licensing Act, 1872, the Conspiracy, &c., Act, 1875, Explosives Act, 1875, Employers' Liability Act, Criminal Law Amendment Act, 1885, Margarine Act, 1887. By the Law of Evidence Amendment Act (40 and 41 Vict., c. 14, s. 1) a defendant is in certain proceedings a *compellable* witness.

12. Should the right of appeal be enlarged in England, and curtailed in India? The long ladder of appeal and revision in India often causes failures of justice. Should an Appellate Court have the power to enhance? All Appellate Courts in India used to have this power, but it is now possessed only by the High Court. The power to enhance is very necessary in India, where almost every convicted person appeals, and where native magistrates sometimes impose very inadequate sentences. In Germany, where the public minister appeals, the sentence can be enhanced. In India (417, C. P. C.) the Local Government can appeal against a sentence of acquittal. Revision, often after appeal, is carried to an absurd excess in India. The limitations on revision (or cassation) in Italy, France, and Germany may well be adopted by the Indian Legislature.

13. In India there is a Chief Magistrate in each district, who can institute cases on complaint, on a police report, on information received from any person, or on his own knowledge or suspicion that an offence has been committed. So, on the continent there are public prosecutors attached to each Court, who have similar powers. In England many offences go unpunished, and nuisances flourish unchecked, for want of initiative or preventive powers.

A knowledge of foreign codes is useful to the Magistrate and Judge as well as to the Legislator. Such a knowledge serves

as a guide to deciding officers in cases where a broad discretion is given them, or in matters on which their own law is silent; while the Legislator can pick the brains of the best jurists of other countries, and extract from their codes whatever he considers suitable for the country and the people for whom he has to legislate. I have noted above what seem to me to be some of the more salient points on which the provisions of continental codes differ from English or Indian law. Their contents may advantageously be studied on the following matters also:—Recruitment of the judicial service, suspension and removal of judicial officers, obligations of private persons to arrest, give information, or assistance, prevention of nuisances, tender of pardon, execution of punishment, bail, transfer of cases, &c. The laws of different nations must differ more or less owing to differences of climate, character, manners, customs, and morals; but it must always be an aid both to Courts and to Legistators to know something of the laws of other countries; and a diffusion of such knowledge must tend to reconcile such differences, or at least to make them less manifest and acute—a consummation which in these days of universal touring and travelling is surely to be most devoutly desired.

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COMPARATIVE
CRIMINAL LAW.

VOL. II. PROCEDURE.

THE INDIAN CODE OF CRIMINAL PROCEDURE,

Act No. X of 1882, *as amended by Acts III of* 1884, *X of* 1886, *and V of* 1887.

An Act to consolidate and amend the law relating to Criminal Procedure.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to Criminal Procedure; It is hereby enacted as follows:—

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PART I.

PRELIMINARY.

CHAPTER I.

Short title. Commencement.

1. This Act may be called "The Code of Criminal Procedure, 1882," and shall come into force on the first day of January, 1883;

Local extent.

It extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law now in force, or shall apply to—

(*a*) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay;

(*b*) any officer duly authorized to try petty offences in military bazars at cantonments and stations occupied by the troops of the Presidencies of Fort St. George and Bombay respectively;

(*c*) heads of villages in the Presidency of Fort Saint George; or

(*d*) village Police-officers in the Presidency of Bombay;

(*e*) and nothing in sections 174, 175 and 176 shall apply to the police in the town of Madras.

In Madras heads of villages may confine offenders in the village choultry for a time not exceeding 12 hours in cases of a trivial nature, such as abusive language and inconsiderable assaults or affrays. If the offenders belong to any of the lower castes, on whom it may not be improper to inflict so degrading a punishment, they may also order them to be put in the stocks for a time not exceeding six hours. Mad. Reg. XI, 1816, s. 10. This jurisdiction of heads of villages was extended to petty thefts by Mad. Reg. IV of 1821, s. 6, cl. 1. Police Patels in Bombay may punish petty offences of assault, abuse, mischief, theft, and public nuisances. Bom. Act VIII of 1867, ss. 15—18. See under s. 6, *infrà*.

Stephen (Cr. L., ii, 345) describes the extreme care with which the Code of 1872, and generally all Acts, are drawn up in India. The Code was first drawn up by a Committee and introduced into the Legislative Council. It was then published in the *Gazette*, circulated throughout India, and reported on minutely by all experienced officers in all parts of the country. It was then referred to a Committee of the Legislative Council, who, at a large number of meetings (each meeting lasting five hours) discussed the criticisms and remarks made on almost every section. "The point," says he, "which made an ineffaceable impression on my mind, was the wonderfully minute and exact acquaintance with every detail of the system displayed by the civilian members of the Committee. They knew to a nicety the history, the origin, and the object of every provision in the Code which we were recasting. Such a section, they would say, represented such a Regulation or such an Act. It was passed in the time of such a Governor-General in order to provide for such and such a state of things, and we must be careful to preserve its effect. To be present at, and take a part in, these discussions was an education not only in the history of British India, but in the history of laws and institutions in general. *I do not believe that one Act of Parliament in fifty is considered with anything approaching to the care or discussed with anything approaching to the mastery of the subject with which Indian Acts are considered and discussed.*" This testimony should be borne in mind by the Anglo-Indian Press and the Indian public generally. The Bengal Tenancy Act is a similar example. In India perhaps even too much attention is paid to uninstructed criticism.

Repeal of enactments.

2. On and from the first day of January, 1883, the enactments mentioned in the first schedule shall be repealed to the

extent specified in the third column thereof, but not so as to restore any jurisdiction or form of procedure not then existing or followed, or to render unlawful the continuance of any confinement which is then lawful.

Notifications, &c., under repealed Acts.

All notifications published, proclamations issued, powers conferred, forms prescribed, local limits defined, sentences passed, and orders, rules and appointments made, under any enactment hereby repealed, or under any enactment repealed by any such enactment, and which are in force immediately before the first day of January, 1883, shall be deemed to have been respectively published, issued, conferred, prescribed, defined, passed and made under the corresponding section of this Code.

References to Code of Criminal Procedure and other repealed enactments.

3. In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act No. XXV of 1861, or Act No. X of 1872, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section.

Expressions in former Acts.

In every enactment passed before this Code comes into force, the expressions "Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class," and "Magistrate of the third class;" the expression "Magistrate of a division of a district" shall be deemed to mean "Subdivisional Magistrate," the expression "Magistrate of the district" shall be deemed to mean District Magistrate," and the expression "Magistrate of Police" shall be deemed to mean "Presidency Magistrate."

Interpretation-clause.

4. In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context:—

'Complaint':

(*a*) 'Complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that

some person, whether known or unknown, has committed an offence; but does not include the report of a Police-officer:

See s. 191. Under s. 18 of the Court Fees Act VII of 1870 a fee of eight annas must be paid on any complaint of a non-cognizable offence. See (*g*), *infra*.

'Investigation':

(*b*) 'Investigation' includes all the proceedings under this Code for the collection of evidence conducted by the police or by any person (other than a Magistrate or Police-officer) who is authorized by a Magistrate in this behalf:

'Inquiry':

(*c*) 'Inquiry' includes every inquiry conducted under this Code by a Magistrate or Court:

'Judicial proceeding':

(*d*) 'Judicial proceeding' means any proceeding in the course of which evidence is or may be legally taken:

'Writing' and 'written':

(*e*) 'Writing' and 'written' include 'printing,' 'lithography,' 'photography,' 'engraving,' and every other mode in which words or figures can be expressed on paper or on any substance:

'Subdivision':

(*f*) 'Subdivision' means a subdivision made under this Code of a District:

'Province':

(*g*) 'Province' means the territories for the time being under the administration of any Local Government:

'Presidency-town':

(*h*) 'Presidency-town' means the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay:

'High Court':

(*i*) 'High Court' means, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras and Bombay, the High Court of Judicature for the North-Western Provinces, the Chief Court of the Punjab and the Recorder of Rangoon:

In other cases 'High Court' means the highest Court of criminal appeal or revision for any local area;

or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf:

'Chief Justice':

(*j*) 'Chief Justice' includes also the senior Judge of a Chief Court:

'Advocate General';

(*k*) 'Advocate General' includes also a Government Advocate, or, where there is no Advocate-General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf:

'Clerk of the Crown':

(*l*) 'Clerk of the Crown' includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown:

'Public Prosecutor':

(*m*) 'Public Prosecutor' means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor; and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction:

'Pleader':

(*n*) 'Pleader,' used with reference to any proceeding in any Court, means a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding:

'Police-station':

(*o*) 'Police-station' means any post declared, generally or specially, by the Local Government, to be a police-station for the purposes of this Code, and includes any local area specified by the Local Government in this behalf; and "Officer in charge of a Police-station" includes, when the officer in charge of the Police-station is absent from the station-house or unable from illness to perform his duties, the Police-officer present at the station-house who is next in rank to such officer and is above the rank of constable, or, when the Local Government so directs, any other Police-officer so present:

'Officer in charge of a police-station':

As amended by Act V of 1887, s. 1.

'Offence':

(*p*) 'Offence' means any act or omission made punishable by any law for the time being in force:

'Cognizable offence':
'Cognizable case':

(*q*) 'Cognizable offence' means an offence for, and 'cognizable case' means a case in, which a Police-officer, within or without the Presidency-towns, may, in

accordance with the second schedule, or under any law for the time being in force, arrest without warrant:

'Non-cognizable offence': 'Non-cognizable case':

'Non-cognizable offence' means an offence for, and 'non-cognizable case' means a case in, which a Police-officer, within or without the Presidency-towns, may not arrest without warrant:

'Bailable offence': 'Non-bailable offence':

(r) 'Bailable offence' means an offence shewn as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and 'non-bailable offence' means any other offence:

'Warrant-case':

(s) 'Warrant-case' means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months:

'Summons-case':

(t) 'Summons-case' means a case relating to an offence not so punishable:

'European British subject':

(u) 'European British subject' means—

(1) any subject of Her Majesty born, naturalized or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American or Australian Colonies or Possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal;

(2) any child or grandchild of any such person by legitimate descent:

'Chapter': 'Schedule':

(v) 'Chapter' means a chapter of this Code; and 'Schedule' means a schedule hereto annexed:

'Place':

(w) 'Place' includes also a house, building, tent and vessel.

Words referring to acts.

Words which refer to acts done extend also to illegal omissions; and

Words to have same meaning as in Penal Code.

all words and expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code.

Trial of offences under Penal Code.

5. All offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter contained;

and all offences under any other law shall be inquired into and tried according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences.

Trial of offences against other law.

See notes under ss. 2, 3, 4, Penal Code.

PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

A.—Classes of Criminal Courts.

6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely:—

Classes of Criminal Courts.

I.—Courts of Session:
II.—Courts of Presidency Magistrates:
III.—Courts of Magistrates of the first class:
IV.—Courts of Magistrates of the second class:
V.—Courts of Magistrates of the third class.

The Courts of District and of Subdivisional Magistrates may be regarded as separate classes. See Schedule III.

In France the lowest grade of Courts are the Police Courts (Tribunaux de Police), which take cognizance of contraventions. There is an appeal to the *Tribunal Correctionel* against a sentence of imprisonment or fine exceeding five francs. The next higher courts —really the Courts of first instance in civil and criminal matters— are the *Tribunaux Correctionnels*, which take cognizance of all misdemeanours (*délits*), where the punishment exceeds fifteen francs fine or five days' imprisonment, and also of offences against the forest laws. The accused, who can always be represented by a proxy at a Police Court, must appear in person before this tribunal, if so ordered, except in those cases in which no imprisonment can be pronounced, when his lawyer (*avoué*) can represent him. In France the *avocat* defends a client, and the *avoué* represents the person of the client. When he does not appear, he is judged by default, and he can only appeal against such a condemnation within five days after the communication of the sentence. The same proofs are admitted as in cases of *contravention*. The ascendants or descendants of the accused, brothers or sisters, or the same relations by marriage, are not admitted as wit-

nesses. The proceedings are as follows:—The public prosecutor or the *partie civile* commences with a statement of the affair; then the *procès verbaux* or reports (if any) are read by the clerk; the witnesses for and against are heard; the accused is interrogated and makes his defence; the public prosecutor sums up the affair and makes his report (*conclusion*); the accused has the right of reply, and thereupon judgment is pronounced either in the same sitting or the next. When the act appears to be only a contravention, the Court pronounces the legal penalty for the same; if it is a crime, the tribunal is incompetent, and can only give a warrant of commitment (*mandat de dépôt*) or warrant of arrest (*mandat d' arrêt*), and the accused is sent before the *Juge d' Instruction*, in order that he may prepare the case for the Court of Assizes (*Cour d' Assises*).

In some continental countries police officers must be classed among Criminal Courts. Article 453 of the German Code of Criminal Procedure empowers the police authorities, in the case of certain contraventions to pronounce a sentence of simple imprisonment (*Haft*) for 14 days or fine. A contravention is the infraction which the law punishes with a maximum of six weeks' simple imprisonment or a fine of 150 marks. Germ. P. C. 1. In some cases the defendant can appeal to superior police authority; when he cannot do so, he can claim a judicial decision within a week.

In Germany the administrative authorities can inflict sentences of fine and confiscation for infractions of revenue laws, such as those relating to stamps, customs, the post, &c. An accused fined by an administrative authority can, within a week, either appeal to higher administrative authority, or claim a judicial decision, but cannot have recourse to both these remedies. If the fine cannot be realized, imprisonment in default can only be ordered by a Judicial Court. If the accused appeals to a Judicial Court, he must declare his intention to the administrative authority, so that the administration may have every opportunity of supporting the order, and safeguarding the interests of the revenue. Germ. C. P. C., Bk. VI., s. 3. There appears to be no reason why collectorate officers in India should not in the same way be empowered to try certain fiscal offences, such as those against the excise laws. They are presumably better able to apportion suitable punishments in such cases. The principle is admitted in the Stamp Act. Sec. 71 of the Forest Act VII. of 1878, empowers forest officers to inquire into forest offences and take evidence; and it has been proposed to empower them to compound for certain offences against the Act. There is something to be said in favour of such a proposal. A village bordering on a forest, may be fifty miles from the nearest Court, and a villager, who has cut reserved wood, would often prefer to pay its value or twice its value rather than be summoned to attend a Magisterial Court and so be subjected to expense and loss of time. Officers in the Public Works Department are sometimes empowered to try certain offences against the Canal Revenue. See under s. 1, *suprà*.

B.—Territorial Divisions.

Sessions Divisions.

7. Every Province (excluding the Presidency-towns) shall be a Sessions Division, or shall consist of Sessions Divisions;

and every Sessions Division shall, for the purposes of this Code, be a District or consist of Districts.

Districts.

The Local Government may alter the limits, or, with the previous sanction of the Governor-General in Council, the number, of such Divisions and Districts.

Power to alter Divisions and Districts.

The Sessions Divisions and Districts existing when this Code comes into force shall be Sessions Divisions and Districts respectively, unless and until they are so altered.

Existing Divisions and Districts maintained till altered.

Every Presidency-town shall, for the purposes of this Code, be deemed to be a District.

Presidency-towns to be deemed Districts.

8. The Local Government may divide any District outside the Presidency-towns into Subdivisions, or make any portion of any such District a Subdivision, and may alter the limits of any Subdivision.

Power to divide Districts into Subdivisions.

All existing Subdivisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code.

Existing Subdivisions maintained.

C.—Courts and Offices outside the Presidency-towns.

9. The Local Government shall establish a Court of Session for every Sessions Division and appoint a Judge of such Court.

Court of Session.

It may also appoint Additional Sessions Judges, Joint Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

10. In every District outside the Presidency-towns, the Local Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

District Magistrate.

11. Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the District, such officer shall, pending the

Officers temporarily succeeding to vacancies in office of District Magistrate.

orders of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

Subordinate Magistrates.

12. The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates of the first, second or third class, in any District outside the Presidency-towns; and the Local Government, or the District Magistrate subject to the control of the Local Government, may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.

Local limits of their jurisdiction.

Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such District.

Power to put Magistrate in charge of Subdivision.

13. The Local Government may place any Magistrate of the first or second class in charge of a Subdivision, and relieve him of the charge as occasion requires.

Such Magistrates shall be called Subdivisional Magistrates.

Delegation of powers to District Magistrate.

The Local Government may delegate its powers under this section to the District Magistrate.

Special Magistrates.

14. The Local Government may confer upon any person all or any of the powers conferred or conferrible by or under this Code on a Magistrate of the first, second or third class, in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the Presidency-towns.

Such Magistrates shall be called Special Magistrates

With the previous sanction of the Governor-General in Council, the Local Government may delegate, with such limitations as it thinks fit, to any officer under its control the power conferred by the first paragraph of this section.

No powers shall be conferred under this section on any Police-officer below the grade of Assistant District Superintendent, and no powers shall be so conferred except so far

as may be necessary for preserving the peace, preventing crime, and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

Benches of Magistrates.

15. The Local Government may direct any two or more Magistrates in any place outside the Presidency-towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrible by or under this Code on a Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the Local Government thinks fit.

Powers exercisable by Bench in absence of special direction.

Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members who is present taking part in the proceedings as a member of the Bench belongs, and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

Pleaders are sometimes made Honorary Magistrates. "No person is capable of becoming or being a Justice of the Peace for any county in England and Wales in which he practises and carries on the profession or business of a Solicitor or Proctor." Steph. Dig., C. P., 34. The Bengal Government seldom appoint Pleaders as Honorary Magistrates. I am not aware of the practice in other Provinces.

Power to frame rules for guidance of Benches.

16. The Local Government may, or subject to the control of the Local Government the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects :—

(*a*) the classes of cases to be tried;

(*b*) the times and places of sitting;

(*c*) the constitution of the Bench for conducting trials;

(*d*) the mode of settling differences of opinion which may arise between the Magistrates in session.

In Bengal, when the Bench consists of an even number, the Chairman has a casting vote: otherwise, the opinion of the majority prevails.

Subordination of Magistrates and Benches to District Magistrate;

17. All Magistrates appointed under sections 12, 13 and 14, and all Benches constituted under section 15, shall be subordinate to the District Magistrate, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Magistrates and Benches; and

to Subdivisional Magistrate.

every Magistrate (other than a Subdivisional Magistrate) and every Bench exercising powers in a Subdivision shall be subordinate to the Subdivisional Magistrate, subject, however, to the general control of the District Magistrate.

Subordination of Assistant Sessions Judges to Sessions Judge.

All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges.

Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15 shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided.

As to subordination to the District Magistrate, see ss. 125, 148, 167, 406, 407, 435, 437, 506, 515. See also s. 349.

D.—Courts of Presidency Magistrates.

Appointment of Presidency Magistrates.

18. The Local Government shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the Presidency-towns, and shall appoint one of such persons to be Chief Magistrate for each such town.

Any two or more of such persons may (subject to the rules made by the Chief Magistrate under the power hereinafter conferred) sit together as a Bench.

Local limits of their jurisdiction.

19. Every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency-town for which he is appointed and within the limits of the port of such town and of any navigable river or channel lead-

ing thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port-dues.

Bombay Court of Petty Sessions.

20. Every Presidency Magistrate in the town of Bombay shall exercise all jurisdiction which, under any law in force immediately before the first day of April, 1877, was exercised in that town by the Court of Petty Sessions:

Provided, that appeals under the law for the time being regulating the municipality of Bombay, shall lie to the Chief Magistrate only.

Chief Magistrate.

21. Every Chief Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code, or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Magistrate, and may, from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate—

(*a*) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town;

(*b*) the times and places at which Benches of Magistrates shall sit;

(*c*) the constitution of such Benches; and

(*d*) the mode of settling differences of opinion which may arise between Magistrates in Session.

E.—Justice of the Peace.

Justice of the Peace for the Mufassal.

22. The Governor-General in Council, so far as regards the whole or any part of British India outside the Presidency-towns,

and every Local Government, so far as regards the territories subject to its administration (other than the towns aforesaid),

may, by notification in the official Gazette, appoint such European British subjects as he or it thinks fit to be Justices of the Peace within and for the territories mentioned in such notification.

It was apparently an oversight that the word 'persons' was not substituted for 'European British subjects' in Act III of 1884 (Ilbert Bill). See s. 443. A *native* District Magistrate may now try a European British subject.

The Code does not state what special duties a Justice of the Peace has as distinguished from a Magistrate, and the origin of the term has been lost sight of. Under the dual system of the Supreme and Sudder Courts Justices used to administer criminal justice to Englishmen. The other Magistrates, the Company's officers, administered justice to natives in the Mofussil, first as deputies, then as successors to the Mogul. When Act XIII of 1856 created Police Magistrates for Presidency-towns, with similar jurisdiction to those in England, it required that they should previously be made Justices of the Peace. Later Act IV of 1877 declared that every Presidency-town Magistrate should be a J. P. by virtue of his office. It was taken for granted in the earlier enactments that all Justices of the Peace would be European British subjects. As to whether a native covenanted civilian could be a J. P., this was settled, *quoad* Presidency-towns, by s. 4 of Act II of 1869. As regards the Mofussil, a section in the Code of 1872 declared that a European British subject could only be tried by a Magistrate of the 1st class, who was himself a J. P. and an E. B. S. As a J. P. has no special functions in the Mofussil except his jurisdiction over Europeans, it followed that a Native Civilian could not be a J. P., or if he could, it would be purely in an honorary sense. The Code of 1882 expressly states that a J. P. for the Mofussil must be an E. B. S., but this again is altered by Act III of 1884 (Ilbert Bill). By this Act all Sessions Judges and *District* Magistrates have jurisdiction over Europeans. There is one Native Sessions Judge in Bengal, and three Native District Magistrates.

In England the duties of a Justice of the Peace are to keep the peace within the district in which he is authorized to act, and to cause to be kept therein all ordinances and statutes for the good of the peace and for preservation of the same and for the quiet rule and government of the Queen's people, and to inquire into and hear and determine such offences as fall within his jurisdiction, and to discharge all other duties imposed upon him by any statute. Steph. Dig., C. P., 28.

Justices of the Peace for the Presidency-towns.

23. The Governor-General in Council or the Local Government, so far as regards the town of Calcutta,

and the Local Government, so far as regards the towns of Madras and Bombay,

may, by notification in the official Gazette, appoint to be Justices of the Peace within the limits of the town mentioned in such notification any persons resident within British India, and not being the subjects of any foreign State whom such Governor-General in Council or Local Government (as the case may be) thinks fit.

Present Justices of the Peace.

24. Every person now acting as a Justice of the Peace within and for any part of British India other than the said towns, under any commission issued by a

High Court, shall be deemed to have been appointed under section 22 by the Governor-General in Council to act as a Justice of the Peace for the whole of British India other than the said towns.

Every person now acting as a Justice of the Peace within the limits of any of the said towns under any such commission shall be deemed to have been appointed under section 23 by the Local Government.

Ex-officio Justices of the Peace.

25. In virtue of their respective offices, the Governor-General, the Ordinary Members of the Council of the Governor-General, the Judges of the High Courts and the Recorder of Rangoon are Justices of the Peace within and for the whole of British India; Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving; and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

As amended by Act III of 1884, s. 1.

F.—Suspension and Removal.

Suspension and removal of Judges and Magistrates.

26. All Judges of Criminal Courts other than the High Courts established by Royal Charter and all Magistrates may be suspended or removed from office by the Local Government:

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor-General in Council only shall not be suspended or removed from office by any other authority.

See sec. 197.

Suspension and removal of Justices of the Peace.

27. The Governor-General in Council may suspend or remove from office any Justice of the Peace appointed by him, and the Local Government may suspend or remove from office any Justice of the Peace appointed by it.

CHAPTER III.

POWERS OF COURTS

A.—Description of offences cognizable by each Court.

Offences under Penal Code.

28. Subject to the other provisions of this Code, any offence under the Indian Penal Code may be tried by the High Court or Court of Session or by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

See ss. 193, 194. Except as provided in s. 477, Sessions Judges can only try cases committed to them by Magistrates. The High Court exercises appellate jurisdiction over the Province. The original jurisdiction of the Calcutta High Court is confined to the town of Calcutta. But see ss. 447, 456, 526.

Offences under other laws.

29. Any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

When no Court is so mentioned, it may be tried by the High Court or by any Court constituted under this Code: Provided that—

(*a*) no Magistrate of the first class shall try any such offence which is punishable with imprisonment for a term which may exceed seven years;

(*b*) no Magistrate of the second class shall try any such offence which is punishable with imprisonment for a term which may extend to three years; and

(*c*) no Magistrate of the third class shall try any such offence which is punishable with imprisonment for a term which may extend to one year.

The Queen's Bench Division of the High Court of Justice has jurisdiction over all offences committed in India or the Colonies which render the offender liable to be tried in England under 11 Will. III., c. 12, or 13 Geo. III., c. 63, s. 39, or 42 Geo. III., c. 85.

Offences not punishable with death.

30. In the territories respectively administered by the Lieutenant-Governor of the Punjab and the Chief Commissioners of Oudh, the Central Provinces, British Burma, Coorg and Assam, and in those parts of the other Provinces in which there are Deputy Commissioners or Assistant Commissioners, the Local Government may, notwithstand-

ing anything contained in section 29, invest the District Magistrate with power to try as a Magistrate all offences not punishable with death.

B.—Sentences which may be passed by Courts of various Classes.

Sentences which High Courts and Sessions Judges may pass.

31. A High Court may pass any sentence authorized by law.

A Sessions Judge, Additional Sessions Judge or Joint Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years; but any sentence of imprisonment for a term exceeding four years and any sentence of transportation passed by an Assistant Sessions Judge shall be subject to confirmation by the Sessions Judge.

As amended by s. 1, Act X of 1886.

Sentences which Magistrates may pass.

32. The Courts of Magistrates may pass the following sentences namely :—

(*a*) Courts of Presidency Magistrates and of Magistrates of the first class :	Imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law ; Fine not exceeding one thousand rupees ; Whipping.
(*b*) Courts of Magistrates of the second class :	Imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law ; Fine not exceeding two hundred rupees ; Whipping.
(*c*) Courts of Magistrates of the third class.	Imprisonment for a term not exceeding one month ; Fine not exceeding fifty rupees.

The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.

No Court of any Magistrate of the second class shall pass a sentence of whipping, unless he is specially empowered in this behalf by the Local Government.

See Whipping Act, VI of 1864. See also Reformatories Act, V of 1876; State Prisoners Acts, XXXIV of 1850 and III of 1858; and Criminal Tribes Act, XXVII of 1871. In Madras, heads of villages may for certain trivial offences place in the stocks for six hours offending persons of any of the lower castes. Madras Reg. XI, 1816, s. 10. See notes under s. 53, P. C.

In France civic degradation is a necessary corollary of a conviction for a crime (as opposed to a delict); in Russia and Germany such punishment is left to the discretion of the Court. In Russia the consequences of condemnation to imprisonment with hard labour are loss of certain family rights, loss of property (which at once passes to the heirs), and after release compulsory residence in Siberia. The Russian Code (27) permits the husband or wife of a condemned person to procure a divorce from the ecclesiastical authorities. The Dutch Penal Code (28) deprives also of the right to exercise certain professions. When the imprisonment is not for life, such deprivation may be imposed for any term from two to five years. The Hungarian Penal Code (54—59) contains some elaborate provisions regarding this form of punishment, which, as well as suspension of political rights, may be imposed in any case in which the principal punishment is imprisonment or detention in a State prison for six months or more. Article 291 of the same code enacts that when any person has caused the death of another by inexperience or negligence in his profession or occupation or by non-observance of the rules relating thereto, the Court may prohibit him from exercising such profession or occupation altogether, or for a fixed time, as it thinks fit, and may order that any fresh authorization shall depend on a new examination or other proof of the required capacity.

Article 310 enacts a similar provision in cases in which serious bodily harm has been caused by negligence of the kind alluded to. In England up till a comparatively recent date, certain forfeitures and other consequences used to follow on a conviction for treason or felony; but they were abolished by statute 33 and 34 Vict., c. 23, s. 1, passed in the year 1870. The opponents of forfeiture argued that such a sentence bears hardly on innocent relations. This objection is partly met in India by the concluding words of sec. 62 of the Penal Code, "subject to such provision for his family and dependants as the Government may think fit to allow during such period."

The incapacity to testify as a witness used to follow as a consequence of a conviction for treason, felony, and all those misdemeanours known by the term *crimen falsi*. See Greenleaf, Evid. i., 373. In some American States the disqualification to testify still exists, if the witness is objected to; otherwise, not. Article 43 of the Russian Penal Code excludes the evidence, except in cases in which it is absolutely indispensable. The French and Belgium Codes allow such

persons to depose only for the purpose of giving simple information. Fr. P. C., 34; Belg. P. C., 31.

In Italy, there are two punishments called "confinement" and "local exile." Under the first the condemned person must live in a certain place; the second forbids him to live in certain specified places. He can choose his own residence, provided it be not less than three myriameters from the commune in which he is domiciled, from that in which the offence has been committed, and from that of the victim or injured party. In case of disobedience, he can be arrested and imprisoned for the remaining duration of his sentence. Ital. P. C., 30; C. P. C., 778. The object of these provisions is to prevent released convicts from oppressing, annoying, or in any way taking vengeance on the complainant, witnesses, or jurors. In India fear of such ulterior oppression often prevents respectable witnesses from coming forward to give evidence. It appears from the Mirror that a punishment analogous to local exile must have existed in England at least as late as the time of Edward II: "Inferior punishments, not capital, were these: mending the highways, causeways and bridges, setting in the pillory and stocks, abjuration of the realm, banishment either from the kingdom *or some particular town*, by prohibiting the entering into or going out of such a place, &c." Mirror, ch. iv., s. 17.

Nearly all criminalists are agreed that *minima* punishments should be abolished, and that the law should merely fix the maximum. As regards circumstances for consideration in awarding punishment, see notes under s. 53, P. C. The Russian Penal Code contains some very detailed directions regarding aggravating and extenuating circumstances. Among the former is enumerated the dissimulation *or obstinacy of denial* which the accused has shown during his trial, especially if he has sought to implicate innocent persons. Among the latter are the fact that accused *has confessed*, the influence of overwhelming need, and want of all resource and means of work, the fact that, after the crime, he has tried to avert the evil consequences and repair the harm done. Russ. P. C., 129, 130, 134. See also Den. P. C., 57; Hung. P. C., 90, 91. The Hungarian Code has *minima* punishment, and enacts that if aggravating circumstances preponderate in number and importance, the punishment will be the maximum or *something near* the maximum: in the converse case, it will be the minimum or something near the minimum. Article 94 enacts that the duration of a long *détention préventive* (hajut) must be taken into consideration, whether in awarding fine or imprisonment.

As to certain sorts of punishment on the Continent, see under sec. 53, P. C. Deprivation of civic rights and in certain cases of the right to exercise certain professions, are punishments under the Dutch and Hungarian Penal Codes. See Dutch P. C., 28; Hungarian P. C., 54—59, 291, 310. The pillory and stocks, whipping, ducking and slitting nostrils were all common-law punishments in England. Of these whipping only remains. In France and Germany corporal punishment has been abolished, and, according to M. Ernest Lehr, the knout is only inflicted on those not exempted from it when, owing to the prisons being too full, a sentence of imprisonment cannot be carried out. In the United States whipping was abolished by Act of Congress in 1839.

The Penal Code of Sardinia (1839) contains a special category of accessory punishments, not to be found in the French Code, namely,

the pillory, the apology, the interdiction, or suspension of the exercise of an employment or profession, business, or art, the submission, and the admonition. The submission consists in the promise made to the Judge either not to commit the act again or to conform himself to what is prescribed to him. The admonition is the censure of the Judge and the warning that in case of repetition, he will incur the severest punishment laid down in the law.

Power of Magistrates to sentence to imprisonment in default of fine.

33. The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law in case of such default: Provided that the term is not in excess of the Magistrate's powers under this Code:

Proviso as to certain cases.

Provided also that in no case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence shall the period of imprisonment awarded in default of payment of the fine exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32.

See secs. 65—67, Penal Code.

Higher powers of certain District Magistrates.

34. The Court of a District Magistrate, specially empowered under section 30, may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years; but any sentence of imprisonment for a term exceeding four years, and any sentence of transportation, shall be subject to confirmation by the Sessions Judge.

Sentence in cases of conviction of several offences at one trial.

35. When a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict: such punishments, when consisting of imprisonment or trans-

portation, to commence the one after the expiration of the other in such order as the Court may direct.

It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court.

Maximum term of punishment.

Provided as follow :—

(*a*) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years :

(*b*) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

For the purpose of confirmation or appeal, aggregate sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

See s. 235 and illustrations thereunder.

See illustrations under s. 235. The Indian law regarding cumulation of punishments is not very favourable to prisoners : the rules in continental codes on this subject (le cumul ou concours de délits) are more reasonable. The *concursus idealis* is when the same act falls under different sections of the penal law ; *concursus realis* or *objectivus* when one person commits several punishable acts. In the former case, only one punishment is applied, and if the punishments differ, the heavier. Germ. P. C., 73 ; Dutch P. C., 55 ; Hung. P. C., 96. If an act falls under a general and a special law, only the latter can be applied. If several acts are so connected that they must be considered as one continuous action, only one section of the penal law is applied : the more heinous, in case of any difference. For instance, if a man forges and uses the forged document, makes or alters false coin and uses it, only one punishment is applied. Dutch P. C., 56. This is reasonable, but the Indian law would allow cumulative punishments. If there is a concourse of several independent acts (punishable with the same kind of punishment), the punishment for one act can be enhanced by one-third—*id.*, 57. See Germ. P. C., 74. If one of several offences is punishable with imprisonment for life, no other punishment can be inflicted—*id.*, 59. If there is a concourse of contraventions, or of delicts and contraventions, there may be cumulative punishments, subject to a certain fixed maximum, *id.* 62 ; Hung. P. C., 97. In the case of concourse of a crime and other punishable acts, punishment for the crime will be applied, and it may be augmented by two years, according to the gravity of the other acts. Hung. P. C., 98. These dispositions apply even when a man is convicted at separate trials ; this is not so in India—*id.*, 104. The rule in Denmark is that, in case of the

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concourse of several acts, the maximum of the punishment for any one act may be awarded, and this may be augmented by one-half, when the offences are of a different nature. Den. P. C., 62.

C.—Ordinary and Additional Powers.

Ordinary powers of Magistrates.

36. All District Magistrates, Subdivisional Magistrates and Magistrates of the first, second and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their 'ordinary powers.'

Additional powers conferrible on Magistrates.

37. In addition to his ordinary powers, any Subdivisional Magistrate or any Magistrate of the first, second or third class, may be invested by the Local Government or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate.

Control of District Magistrates' investing power.

38. The power conferred on the District Magistrate by section 37 shall be exercised subject to the control of the Local Government.

D.—Conferment, Continuance and Cancellation of Powers.

Mode of conferring powers

39. In conferring powers under this Code, the Local Government may by order empower persons specially by name or in virtue of their office, or classes of officials generally by their official titles.

Every such order shall take effect from the date on which it is communicated to the person so empowered.

Continuance of powers of officers transferred.

40. Whenever any person holding an office in the service of Government, who has been invested with any powers under this Code throughout any local area, is transferred to an equal or higher office of the same nature within a like local area under the same Local Government, he shall, unless the Local Government otherwise directs or has otherwise directed, continue to exercise the same powers in the local area to which he is so transferred.

41. The Local Government may withdraw any powers conferred under this Code on any person by it or by any officer subordinate to it.

Powers may be cancelled.

PART III.

GENERAL PROVISIONS

CHAPTER IV.

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS.

42. Every person is bound to assist a Magistrate or Police-officer reasonably demanding his aid, whether within or without the Presidency-towns.

Public when to assist Magistrates and police.

(*a*) in the taking of any other person whom such Magistrate or Police-officer is authorized to arrest;

(*b*) in the prevention of a breach of the peace, or of any injury attempted to be committed to any railway, canal, telegraph or public property; or

(*c*) in the suppression of a riot or an affray.

"It is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not to the call of the Magistrate, as they think proper; but every man is bound when called upon under pain of fine and imprisonment to yield a ready and implicit obedience to the call of the Magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly. Magistrates have full power to command assistance by way of precaution ('in the prevention of a breach of the peace'), when tumult, riot, or felony is merely likely to take place, or may reasonably be apprehended." Act 1 and 2, Will. IV, c. 41. Charge of L. C. J. Tindal to Bristol Grand Jury.

In India persons cannot be punished for refusing to give aid in cases of accidents, fires, &c. In France and Belgium it is a police contravention of the second class to refuse to give aid in such cases, and also in cases of inundation, shipwreck, tumults, robbery, pillage, flagrant delicts, public clamour, *or execution of judicial orders.* Fr. P. C., 475 (12); Belg. P. C., 556 (5). Ruled by the Court of Cassation that the accidents, in respect of which aid can be demanded, must be in the nature of *public* calamities—accidents which are likely to compromise the peace or the public safety; that a private person, for instance, cannot be punished for refusal to carry on a litter the corpse of a man killed on the highway. Cass. 13th May, 1854. It is sufficient if the demand for assistance be verbal, and the excuse of

good faith cannot be received. Cass. 12th May, 1871. In India it is necessary to impose by law an obligation to render assistance in cases of fire. The law in Germany is the same as in France, except that the words "without exposing themselves to serious danger" are added after "being able to render assistance."

In England also it is an indictable offence to refuse when called upon by a constable for assistance in resisting an assault made upon him by prisoners in his custody on a charge of felony.—*R.* v. *Sherlock*, 35 L. J., M. C., 92.

"Every person . . . . reasonably." The Louisiana P. C., 220 imposes the duty on "free able-bodied male persons, above 18 years of age and under 50."

To support an indictment in England against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove: (1) that the constable saw a breach of the peace committed; (2) that there was a reasonable necessity for calling on the defendant for his assistance; and (3) that when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and in such a case it is no ground of defence that from the number of rioters the single aid of the defendant would not have been of any use. *R.* v. *Brown*, Car. & M., 314.

Aid to person other than Police-officer, executing warrant.

43. When a warrant is directed to a person other than a Police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

Public to give information of certain offences.

44. Every person, whether within or without the Presidency-towns, aware of the commission of, or of the intention of any other person to commit, any offence punishable under the following sections of the Indian Penal Code (namely), 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459, and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or Police-officer of such commission or intention.

These sections relate to waging war, sedition, homicide, robbery, dacoity, arson and burglary.

Under the Italian Code of Criminal Procedure, any person present at a punishable act, or who may have come to know of it, may denounce it to the *Procureur du Roi* or to an officer of the judicial police. The denunciation may be written or verbal; if verbal, it is

to be reduced to writing and signed by the denouncer. Every public officer or authority, who, in the exercise of his duties, shall get to know of a crime or a delict (giving rise to the public action) shall be bound to report it to the *Procureur du Roi* attached to the tribunal having jurisdiction. Ital. C. P. C., 98—101. The medical profession in Italy are under peculiar legal obligations, which do not appear to exist in other countries. Doctors, Surgeons, and other officers of health must inform the *Juge d' Instruction* or the local judicial police, within 24 hours, or immediately in cases of serious danger, of poisonings, wounds or any other sort of bodily outrage, in which they have given the aid of their profession. They must also give all particulars as to the wounds inflicted, the weapons with which inflicted, and the time at which they were probably inflicted. Such declaration has to be made on oath. Ital. C. P. C., 102. Omission or delay in giving information is punishable with a fine of 100 francs, and in grave cases, imprisonment as well and suspension from the exercise of their profession, under s. 308 of the Penal Code.

The imposition of a legal obligation on *all* persons to report certain offences appears to be of the nature of exceptional legislation. Sanford in his "Penal Codes of Europe" speaks of the provision at the end of the 3rd chapter of the Prussian Penal Code as peculiar. The section enacts that "whoever has received notice of a project of high treason, counterfeiting of money, murder, robbery, kidnapping, or a crime dangerous to the life of man, when it is still possible to prevent the commission of the same, and fails to denounce the fact to the authorities, or to the person threatened, is punishable with imprisonment for a term which can be extended to five years, if the crime be committed or attempted."

Village headmen, landholders and others bound to report certain matters.

45. Every village headman, village watchman, village Police-officer, owner or occupier of land, *and* the agent of any such owner or occupier, and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate, or to the officer in charge of the nearest Police-station, whichever is the nearer, any information which he may obtain respecting—

(*a*) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, watchman or Police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;

(*b*) the resort to any place within, or the passage through such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

(*c*) the commission of, or intention to commit any, non-bailable offence in or near such village;

(*d*) the occurrence therein of any sudden or unnatural death or of ony death under suspicious circumstances.

EXPLANATION.—In this section 'village' includes village-lands.

Clause (*d*). As regards inquests in the case of suspicious deaths, see s. 174. There appears to be no law under which a man (not a public servant) can be punished for burning the body of a person who has died under suspicious circumstances and so preventing an investigation being made. In a prosecution under s. 201, P. C., it is necessary to prove that an offence has been committed; but in many cases this cannot be ascertained without a careful investigation under s. 174, *infra*. The law enjoins a certain procedure in cases of suspicious or sudden death, but contains no penal provision for a disregard of it. It is an offence to destroy a document under sec. 204, P. C., to prevent its being used as evidence; but a man who burns a body with the same intent may get off, when by so doing he destroys perhaps the sole evidence of the commission of an offence. It is a misdemeanour in England to bury a body before a Coroner's Inquest. In India bodies rapidly decompose, and religion requires that they should be buried quickly. The police might occasionally extort money, but such an objection might be urged against many existing provisions of the law.

CHAPTER V.

OF ARREST, ESCAPE AND RETAKING.

A.—Arrest generally.

Arrest how made.

46. In making an arrest, the Police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Resisting endeavour to arrest.

If such person forcibly resists the endeavour to arrest him, or attemps to evade the arrest, such Police-officer or other person may use all means necessary to effect the arrest.

Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death, or with transportation for life.

See s. 99, P. C., and s. 80, *infra*. Mayne in his Penal Code, thinks that by English law a man may, but by Indian law may not, shoot a highwayman galloping away. But if he can do so, it is not in the exercise of the right of private defence; it would fall under the head of arresting felons (Steph. Dig., 199); and shooting for this purpose is allowed by the third clause of this section (which Mayne has

overlooked), if the offender has rendered himself liable to transportation for life (*e.g.*, offences under ss. 394, 395, P. C.). The Scotch law (Al. Cr. L., 37) only justifies the killing of a runaway criminal, when the charge against him is a capital one.

In England an officer making a lawful arrest for felony may, if necessary, kill the person sought to be arrested, in self-defence, if such party resist, or even to prevent his escape if he fly, provided the felony can be proved against the deceased—1 Hale, 481. But the homicide would not be justifiable, even though the charge were one of felony, if the arrest would have been illegal. How can a man be killed in mere pursuit, where the charge is only one of misdemeanour?—Foster, 271.

"If a prisoner resists, the constable is bound to struggle with him and overpower him, but not injure him unnecessarily. If the constable is likely to be overpowered, he may draw his truncheon, and use it, taking care to avoid striking anyone on the head. The arms and legs should be aimed at to disable a prisoner, as parts of the frame least likely to suffer serious injury. Prisoners who are very violent, or who are charged with very serious offences, are, if necessary, to be handcuffed to prevent danger or the possibility of escape"—Metrop. Police Orders.

Search of place entered by person sought to be arrested.

47. If any person acting under a warrant of arrest, or any Police-officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such Police-officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Procedure where ingress not obtainable.

48. If ingress to such place cannot be obtained under section 47, it shall be lawful in any case for a person acting under a warrant, and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a Police-officer, to enter such place and search therein, and

in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance:

Breaking open zenana.

Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who

according to custom, does not appear in public, such person or Police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

In England a constable, after demanding entrance, may break open an outer door in cases of misdemeanour as well as of felony. In the latter case the necessity of a previous demand for admission seems to be doubtful. There is no necessity for such demand in the case of inner doors, which seem to rest on the same footing as cupboards, boxes, &c., and no special sanctity attaches to barns, outhouses, &c. *Lee* v. *Gansel*, 1 Cowp., 1; *Semayne's case*, Smith L. C. i., 113.

In Louisiana the *outer* door of a house may not be broken except by an officer or other person having a warrant of arrest; but, in case of crimes punishable with imprisonment for life, it may be broken by any person authorized to arrest without a warrant. When a house has once been entered, any one may break open any inner door of any apartment, if entrance be refused.—Lou. C. P. C., 165—168.

Power to break open doors and windows for purposes of liberation.

49. Any Police-officer or other person authorized to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

No unnecessary restraint.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

An unconvicted prisoner ought not to be handcuffed where there is no reason to fear an attempt at an escape or rescue, and it seems that a constable who manacles a prisoner without reasonable ground for apprehending violence, is liable to an action for assault.—*Wright* v. *Court*, 4 B. and C., 596; *Griffin* v. *Coleman*, 4 H. & N., 265; 2 Hale, P. C., 219. But prisoners may be manacled if there is reasonable ground for it; and in 1867, at Manchester, the Magistrate, Mr. Fowler, refused to have the fetters taken off certain Fenian prisoners arraigned in Court before him.—Solicitors' Journal, 11, 1063.

Search of arrested persons.

51. Whenever a person is arrested by a Police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail, but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person, the Police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparel, found upon him.

Money found on an accused person may be applied to payment of fine.

Under English law prisoners are not entitled to copies of papers which have been seized at their house.—*R.* v. *Frost*, 9 C. & P., 132.

In England money found on a prisoner may be restored to him before trial by order of the Court if the depositions show that it is not material to the charge against him.—*R.* v. *Barnett*, 3 C. & P., 600. By 42 & 43 Vict., c. 49, s. 44, the Police are bound to make a report to the Court of all property taken from an accused person; and the Court, if of opinion, that such property or any portion of it can, consistently with the interests of justice, be returned to the accused, shall make an order to that effect.

The following is an extract from the Metropolitan Police Orders :—

1. Persons charged with felony are to be searched *with a view to discovering* evidence bearing upon the charge.

2. Persons suspected of making, uttering, or possessing, counterfeit coin, should be searched immediately at the place where taken into custody, if this be possible.

3. Persons reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained may be searched.

4. Prisoners insensible from illness, drunkenness or any other cause, are to be searched, solely for safe custody of their property, and its return to them.

5. Prisoners who are drunk and riotous, or known or suspected to be dangerous, are to be searched for the purpose of depriving them of arms or weapons by which they might make their escape, or inflict injury on themselves or those about them. See s. 53, *infra*.

In several statutes the Legislature in England appears to have taken for granted the existence at common law of a right on the part of constables to search arrested prisoners. Several learned judges have remarked on the propriety of returning to prisoners property taken from them which appears to have nothing to do with the charge against them.—*R.* v. *Griffiths*, 8 J. P., 66; *R.* v. *O'Donnell*, 7 C. & P., 138, &c. In all these cases it appears not to have been questioned by the Court that the inconvenience or indignity of having the person searched is like that of having the liberty restrained, one which all citizens must be liable to undergo if they fall under a suspicion of having committed a crime. The right of searching unconvicted prisoners appears to be assumed in the Prisons Act, 1877 (40 & 41 Vict., c. 21) which enacts that the Secretary of State shall make special rules with respect to the retention by a prisoner of the possession of any books, papers or documents in his possession at the time of his arrest, and which may not be required for evidence against

him, and are not reasonably suspected of forming part of property improperly acquired by him, or are not for some special reason required to be taken from him for the purposes of justice.

Mode of searching women.

52. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

Power to seize offensive weapons.

53. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

B.—Arrest without Warrant.

When Police may arrest without warrant.

54. Any Police-officer may, without an order from a Magistrate and without a warrant, arrest—

first—any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned;

secondly—any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;

thirdly—any person who has been proclaimed as an offender either under this Code or by order of the Local Government;

fourthly—any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly—any person who obstructs a Police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody, and

sixthly—any person reasonably suspected of being a deserter from Her Majesty's Army or Navy.

This section applies to the Police in the towns of Calcutta and Bombay.

A private person in England has almost as much power of arrest as a constable in India. See notes under s. 59. But when a private

person arrests only on *reasonable suspicion* of felony, he does so at his peril; that is, if no felony has actually been committed, he is liable to the consequences of false imprisonment.

The Criminal Procedure Code does not make it clear whether, in the case of offences under ss. 426, 427, Penal Code, a Police-officer can arrest to prevent injury to property. Section 42 (*b*) speaks of "public property." Under s. 23, Act V. 1861, a Police-officer is bound to prevent the commission of *offences* and public nuisances. How could a Police-officer prevent the commission of mischief otherwise than by arresting? In England, s. 61 of the "Malicious Injuries to Property Act" (24 & 25 Vict., c. 97), is as follows: "Any person found committing any offence against this Act (whether punishable on indictment or summary conviction), may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured or his servant, or any person authorised by him, and forthwith taken before some neighbouring Justice, to be dealt with according to law." See notes under s. 59, *infra*.

"Any implement of house-breaking." Any instrument which from its nature is capable of being used for house-breaking, though ordinarily used for lawful purposes, *e. g.*, a house door-key or a pair of pincers, is an implement of housebreaking sufficiently to support an indictment under 24 & 25 Vict. c. 96, s. 58. *R.* v. *Oldham*, 2 D. 472; 3 C. & K., 250. Mr. Snowden, in his "Constables' Guide," p. 84, (6th Ed.) mentions going with the face blackened at night by way of disguise with intent to commit, &c., as a ground of apprehension without warrant.

In cities and towns in America even in cases where it is not certain that an offence has been committed, it is the duty of officers of justice and watchmen without warrant to arrest and detain for examination such persons as may be found at night, under such circumstances as justify a reasonable suspicion that they have committed or intended to commit an offence."

It has been held in England that where a mob is assembled and increasing in consequence of abusive language used by a person, a constable who hears him is justified in arresting and taking him before a Magistrate, to prevent a breach of the peace, though no actual riot is proved. *Cohen* v. *Huskisson*, 6 L. J., M. C., 133. A Police-officer in India probably has the same power. See s. 42, *supra*, and Act V, 1861, s. 23. So a constable may arrest without a warrant any person whom he sees commit an assault, even after the violence has ceased, *provided all danger of further violence has not ceased. Coupey* v. *Henley*, 2 Esp. 540; *R.* v. *Light*, 7 Cox, C. C. 389, C. C. R.

The police in India may arrest without a warrant for any act causing danger, obstruction or injury in a public way (s. 283, P. C.). But if the act is a simple nuisance under s. 290 of the Penal Code, they must inform the Magistrate. If, however, there has been a Magisterial or other valid prohibitory order, they may arrest for continuance or repetition of the nuisance. (s. 291, P. C.)

Arrest of vagabonds, habitual robbers, &c.

55. Any officer in charge of a Police-station may, in like manner, arrest or cause to be arrested—

(*a*) any person found taking precautions to conceal his

presence within the limits of such station, under circumstances which affords reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(*b*) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or

(*c*) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion, or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

This section applies to the Police in the towns of Calcutta and Bombay.

2 & 3 Vict., c. 47, s. 64, permits the arrest without warrant of all loose, idle, and disorderly persons whom a constable shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed *or being about to commit* any felony, misdemeanor, or breach of the peace, and of all persons lying or loitering at night in any highway, yard, &c., and not giving a satisfactory account of themselves. This is a Metropolitan Police Act. The exact correlative of s. 55 (*a*) in the general law is s. 66 of 24 & 25 Vict., c. 100. "Any constable or peace officer may take into custody without a warrant any person whom he shall find lying or loitering in any place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony mentioned in the Act, and shall take such person as soon as reasonably may be before a Justice, to be dealt with according to law." See ss. 109, 110, *infrà*, which regulate the procedure as to taking security.

The words "against whom a hue and cry has been raised" were in the Code of 1872, but have been omitted in this Code. See 2 Hawk. P. C., c. 12, s. 16.

Procedure when Police-officer deputes subordinate to arrest without warrant.

56. When any officer in charge of a Police-station requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence for which the arrest is to be made.

This section applies to the Police in the towns of Calcutta and Bombay.

Refusal to give name and residence.

57. When any person in the presence of a Police-officer commits, or is accused of committing, a non-cognizable offence, and refuses, on demand of a Police-officer, to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained; and he shall, within twenty-four hours from the arrest, be forwarded to the nearest Magistrate, unless before the expiration of that time, his true name and residence are ascertained, in which case he shall be released on his executing a bond for his appearance before a Magistrate if so required.

Pursuit of offenders into other jurisdictions.

58. A Police-officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this chapter, pursue such person into any place in British India.

So officers of the peace in Germany may pursue fugitives into any State of the German Empire. Germ. C. O. J., 168.

Arrest by private person.

59. Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or who has been proclaimed as an offender;

Procedure on such arrest.

and shall, without unnecessary delay, make over any person so arrested to a Police-officer; or in the absence of a Police-officer, take such person to the nearest Police-station.

If there is reason to believe that such person comes under the provisions of section 54, a Police-officer shall re-arrest him.

If there is reason to believe that he has committed a non-cognizable offence, and he refuses, on the demand of a Police-officer, to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no reason to believe that he has committed any offence, he shall be at once discharged.

In Louisiana any private person may arrest any one in the act of committing a crime (*i. e.*, an offence punishable with confinement at

hard labour, or forfeiture of any civil or political right).—Lou. C. P. C., 147. This is similar to the Indian Law.

In New York a private person may arrest another :

1. For a public offence committed or attempted in his presence.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.—N. Y. C. P. C., 181. These powers of arrest are very extensive.

The power of arrest possessed by private persons in England, is wider than in India. In *Hollyday* v. *Oxenbridge*, (Cro. Car., 324) it was ruled that a common cheat might be arrested by a person whom he had cheated at cards while still in the house where he had committed the offence. Lord Tenterden (referring to passages cited from Hawkins and Hale in justification of an arrest for a misdemeanour after the fact) says : "The instances in Hawkins are where the party is caught in the fact . . . . the instances in Hale of arrest after the fact is over relate to felony." More recently it was said by Cockburn, C. J., (*Griffiths* v. *Taylor*, 48 L. J., App. (C. P.) 152) : "Where any one is found actually committing an offence, it is not necessary to wait till a warrant can be obtained if the arrest is effected actually on the spot, and the prisoner is forthwith brought before a Magistrate. It seems to be sometimes supposed that the right of private persons to arrest an offender committing a misdemeanour is limited to those misdemeanours which partake of the nature of a breach of the peace. But the more correct view appears to be that, excepting such crimes as consist in mere omission, or non-feasance, as *e. g.*, neglecting to provide one's family with food, there is no distinction between one misdemeanour and another. In fact, all misdemeanours, with the possible exception of perjury and forgery, are breaches of the King's or Queen's peace, as appears from the old forms of indictments *contra pacem*." From the above it seems that in case of misdemeanours which are actual, a constable, or even a private person, may arrest the offender in the act.—*Fox* v. *Gaunt*, 3 B. and Ad., 798. In case of the misdemeanour which consists in an attempt to commit felony, there is an actual duty laid on all who witness it to arrest the offender.—1 Hawk, P. C., 59, 2 ; Year Book, 9 Edw. IV, fol. 26, pl. 36. Under 24 and 25 Vict., c. 96, s. 103, any person to whom property is offered to be sold, pawned or delivered, if he has reasonable cause to suspect that any offence punishable under the Larceny Act has been committed with respect to such property, is authorized *and required* to forthwith take the party offering and the property offered before a Magistrate.

Any person may apprehend another found committing an indictable offence or an offence against the Coinage Act. 24 & 25 Vict., c. 99, s. 31.

Person arrested to be taken before Magistrate or officer in charge of Police-station.

60. A Police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a Police-station.

Person arrested not to be detained more than 24 hours.

61. No Police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Police to report apprehensions.

62. Officers in charge of Police-station shall report to the District Magistrate, or, if he so directs, to the Subdivisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Discharge of person apprehended.

63. No person who has been arrested by a Police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

Offence committed in Magistrate's presence.

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may, thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Arrest by or in presence of Magistrate.

65. Any Magistrate may at any time arrest or direct the arrest in his presence within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Power, on escape, to pursue and retake.

66. If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India.

Provisions of sections 47, 48 and 49 to apply to arrests under section 66.

67. The provisions of sections 47, 48 and 49 shall apply to arrests under section 66, although the person making any such arrest is not acting under a warrant and is not a Police-officer having authority to arrest.

CHAPTER VI.

OF PROCESSES TO COMPEL APPEARANCE.

A.—Summons.

Form of summons.

68. Every summons issued by a Court under this Code shall be in writing in duplicate signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time, by rule, direct.

Summons by whom served.

Such summons shall be served by a Police-officer, or, subject to such rules consistent with this Code as the Local Government may prescribe in this behalf, by an officer of the Court issuing it.

This section applies to the Police in the towns of Calcutta and Bombay.

Summons how served.

69. The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Signature of receipt for summons.

Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Refusal to sign a receipt would be punishable under s. 173, P. C.

Service when person summoned cannot be found.

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a Presidency-town, with his servant residing with him; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Procedure when receipt cannot be obtained.

71. If the signature mentioned in sections 69 and 70 cannot by the exercise of due diligence be obtained, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

72. Where the person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court with the endorsement required by that section.

Service on servant of Government or of Railway Company.

In Germany certain persons are exempt from appearance in Court, and must be examined at their offices or residences: the Chancellor of the empire, the ministers of different States, the members of the senate in free towns, the heads of superior departments, and the heads of ministries. Germ. C. P. C., 49. Some similar rule is required in England and India.

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Service of summons outside local limits.

74. When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

Proof of service in such cases, and when serving officer not present.

The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

B.—Warrant of Arrest.

75. Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or, in the case of a Bench of Magistrates, by any

Form of warrant of arrest.

member of such Bench; and shall bear the seal of the Court.

Continuance of warrant of arrest.

Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Under the French Criminal Procedure Code there are four kinds of process. The *mandat de comparution* is a citation or order to appear. It can be issued by the *Juge d'Instruction* except in the case of heinous offences. The *mandat d'amener* is a warrant of arrest, and is issued (1) in the case of grave offences; (2) when the *mandat de comparution* is not obeyed. The *Juge d'Instruction* must examine the accused at once when he appears to a citation, and within 24 hours in the case of arrest. The *mandat de dépôt* is a sort of intermediate act between the *mandat d' amener* and the *mandat d'arrêt*. It is intended for two cases only, (1) when the accused is outside the arrondissement of the *Juge d'Instruction* who has issued the *mandat d'amener*; (2) when, seized *in flagranti delicto*, he is taken before the *Juge d'Instruction* who sends him temporarily to the *maison d'arrêt*. The *mandat d'arrêt* is only issued by the *Juge d'Instruction* when, after the first acts which have followed the above processes, he thinks it necessary to continue the detention of the accused in order to proceed to further acts of procedure. It thus resembles the hajut-warrant. It must state the act for which it is issued, and also the section of the law, which declares the act to be a crime or delict. Omission to state these particulars invalidates the mandat.—Cass. 5th September 1817.—Fr. C. P. C., chap. vii.

Court may direct security to be taken.

76. Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person execute a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

The endorsement shall state (*a*) the number of sureties, (*b*) the amount in which they and the person for whose arrest the warrant is issued are to be respectively bound, and (*c*) the time at which he is to attend before the Court.

Recognizance to be forwarded.

Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

Warrants to whom directed.

77. A warrant of arrest shall ordinarily be directed to one or more Police-officers, and, when issued by a Presidency Magistrate, shall always be so directed; but any

other Court issuing such a warrant may, if its immediate execution is necessary, and no Police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

Warrant to several persons.

When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more, of them.

78. A District Magistrate or Subdivisional Magistrate may direct a warrant to any landholder, farmer or manager of land within his district or subdivision for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit.

Warrant may be directed to landholders, &c.

Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued is in, or enters on, his land or farm, or the land under his charge.

When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest Police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

79. A warrant directed to any Police-officer may also be executed by any other Police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Warrant directed to Police-officer.

80. The Police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

Notification of substance of warrant.

"Shall notify the substance". There is the same rule in England, but it cannot in all cases be considered imperative. It has been ruled that where the circumstances are such that a man must know why a person is about to apprehend him, he need not be told, and the arrest will be legal and the resistance illegal, just as if he had been told. *R.* v. *Howarth*, 1 Moo. C. C., 207.

Person arrested to be brought before Court without delay.

81. The Police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay, bring the person arrested before the Court before which he is required by law to produce such person.

Where warrant may be executed.

82. A warrant of arrest may be executed at any place in British India.

By 29 Car. 2, c. 7, s. 6, arrests may be effected on Sunday.

The Code says nothing as to time of execution. By 11 and 12 Vict., c. 42, s. 4, a warrant may be executed on a Sunday. By the English law an arrest may be made for any indictable offence on a Sunday; and in the case of felonies or breaches of the peace, the arrest may be made in the night-time as well as the day. *Rawlins* v. *Ellis*, 16 M. & W., 172; Harris, Cr. L., 344, 4th Edn.; 9 Rep., 66a.

In Germany an accused may be arrested at any time, and the Procedure Code makes no distinction between day and night, except that the rules in Article 104 as to the inviolability of the domicile must be observed. See notes under s. 98.

Warrant forwarded to Magistrate for execution outside jurisdiction.

83. When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a Police-officer, forward the same by post or otherwise to any Magistrate or Commissioner of Police within the local limits of whose jurisdiction it is to be executed.

The Magistrate or Commissioner to whom such warrant is so forwarded shall endorse his name thereon, and, if practicable, cause it to be executed within the local limits of his jurisdiction.

Warrant directed to Police-officer for execution outside jurisdiction.

84. When a warrant directed to a Police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a Police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

Such Magistrate or Police-officer shall endorse his name thereon, and such endorsement shall be sufficient authority to the Police-officer to whom the warrant is directed to execute the same within such limits, and the local police

shall, if so required, assist such officer in executing such warrant.

Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or Police-officer within the local limits of whose jurisdiction the warrant is to be executed will prevent such execution, the Police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

This section applies to the Police in the towns of Calcutta and Bombay.

Procedure on arrest of person against whom warrant issued.

85. When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest, or is nearer than the Magistrate or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Commissioner.

Procedure by Magistrate before whom person arrested is brought.

86. Such Magistrate or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court: Provided that if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

Nothing in this section shall be deemed to prevent a Police-officer from taking security under section 76.

C.—Proclamation and Attachment.

Proclamation for person absconding.

87. If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself, so that such warrant cannot be executed, such Court may publish a written proclamation requiring

him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

The proclamation shall be published as follows :—

(*a*) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(*b*) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; and

(*c*) a copy thereof shall be affixed to some conspicuous part of the Court-house.

A statement by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

The proclamation procedure can now be adopted in any case; under the Code of 1872 it could be adopted in warrant cases only. See s. 4 (s.).

Attachment of property of person absconding.

88. The Court may, after issuing a proclamation under section 87, order the attachment of any property, moveable or immoveable, or both, belonging to the proclaimed person.

Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district, when endorsed by the District Magistrate or Chief Presidency Magistrate within whose district such property is situate.

If the property ordered to be attached be debts or other moveable property, the attachment under this section shall be made—

(*a*) by seizure; or

(*b*) by the appointment of a receiver; or

(*c*) by an order in writing, prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(*d*) by all or any two of such methods, as the Court thinks fit.

If the property ordered to be attached be immoveable, the attachment under this section shall, in the case of land

paying revenue to Government, be made through the Collector of the District which the land is situated, and in all other cases—

(*e*) by taking possession; or

(*f*) by the appointment of a receiver; or

(*g*) by an order in writing, prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(*h*) by all or any two of such methods, as the Court thinks fit.

The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure.

If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government; but it shall not be sold until the expiration of six months from the date of the attachment, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

In India accused persons are never tried in their absence. In France the procedure in the case of absconders is as follows: Ten days after publication of proclamation, the president of the country assize issues an order calling on the absconder (le contumax) to appear within ten days under penalty of having his goods forfeited, and of losing all the rights of a citizen. After a further lapse of ten days, the Court proceeds to decide the case. No counsel can appear for the accused, but, if he is not in France or it is impossible for him to appear, his parents or friends may state the grounds of his non-appearance. If the Court considers the excuse to be valid, it suspends judgment and also the forfeiture of the goods for a period which is fixed with regard to the nature of the excuse and to the distance of the places. Otherwise, it proceeds to decide first on the regularity of the procedure, and then on the merits of the matter, without the aid or intervention of a jury. The Court actually comes to a finding. If it convicts the accused, the conviction is published in a variety of ways. If the accused gives himself up or is arrested before the punishment awarded is extinguished by prescription, he is to be tried in the ordinary way. If for any reason the witnesses cannot be produced, their depositions are read as evidence, and also the written answers of the other accused. The same rule applies to all other documents or exhibits likely to throw light on the guilty parties.—Fr. C. P. C., 465—478.

Restoration of attached property.

89. If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government under the last paragraph of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

D.—Other rules regarding Processes.

Issue of, warrant in lieu of, or in addition to, summons.

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

(*a*) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(*b*) If at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith, and no reasonable excuse is offered for such failure.

"Duly served in time to admit of his appearing in accordance therewith." This is a point for the Court to decide. In Italy the summons must be served at least eight clear days before the date fixed for appearance, with an addition of one day for every three myriameters distance.—Ital. C. P. C., 375.

In the French Police Courts and Correctional Courts, a person, who does not appear on citation, may be tried in his absence by default, but he has a right to set aside such a judgment by "forming opposition" to it within a certain time, in which case he has a right to be heard at the next sitting of the Court.—Code d' Instruction Criminelle, 149, *seq.* and 185, *seq.*

Power to take bond for appearance.

91. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant is present in such Court, such

officer may require such person to execute a bond with or without sureties for his appearance in such Court.

Arrest on breach of bond for appearance.

92. When any person, who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant, directing that such person be arrested and produced before him.

Provisions in this chapter generally applicable to summonses and warrants of arrest.

93. The provisions contained in this chapter relating to a summons and warrant and their issue, service and execution shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVEABLE PROPERTY AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

A.—Summons to produce.

Summons to produce document or other thing.

94. Whenever any Court, or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a Police-station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he cause such document or thing to be produced instead of attending personally to produce the same.

Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, post-card, telegram or other document in the custody of the Postal or Telegraph authorities.

Procedure as to letters and telegrams.

95. If any document in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document to such person as such Magistrate or Court directs.

If any such document is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

In England a Secretary of State may open, detain, or delay a letter. 9 Anne, c. 10, s. 40.

In Germany letters and telegrams to the address of the accused may be seized in the Post or Telegraph Offices. It was proposed in the Reichstag that this should not be allowed in the case of contraventions, but the proposal was rejected. Article 5 of the Postal Law of 28th October 1871 guarantees the inviolability of the secrecy of letters, except in cases in which the legislature thinks necessary to depart from the principle in the public interests. Articles 99—101 of the German Procedure Code have been framed in accordance with this exception. Letters and telegrams may be seized, if suspected to have emanated from the accused, or to be intended for him, though not addressed to him, and which it is supposed may throw some light on the matter at issue.

B.—Search-warrants.

When search-warrant may be issued.

96. Where any Court has reason to believe that a person, to whom a summons or order under section 94 or a requisition under section 95, paragraph one, has been or might be addressed will not or would not produce the document, or other thing as required by such summons or requisition,

or where such document or other thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained.

Nothing herein contained shall authorize any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document in the custody of the Postal or Telegraph authorities.

A search-warrant will not be issued for the production of the private books of a prosecutor, in order to be evidence for the defence. Kyshe's Straits Settlements Rep., iii., 107.

"General Search or Inspection."—This provision is counter to a rule of the English common law, to which much importance was formerly attached, but it does not go much beyond the powers which have now been conferred upon Justices by successive statutes. The more important constitutional principle, which condemns general warrants of arrest, is as strictly observed in India as in England. But the power of ordering a *general* search for person alleged to be wrongfully confined does not appear to exist in England. See s. 100.

This section gives a power of *general* search and inspection; but it seems doubtful whether there is any power, except under sec. 98, to seize and *bring away all* the documents in a house. It may be remarked that the *cases of general warrants* in England very narrowly escaped being decided in the opposite way to that in which they were decided. There is a decree of the Star-Chamber in 1636, which recites an older decree of the time of Elizabeth, giving the power of general search. In the reign of Charles II the Licensing Act was passed—13 and 14 Car. 2, c. 33, which gave the Secretary of State a power to issue such warrants. The search allowed was general, and if during the search any suspected libels were found, they and they only could be seized. This Act expired in the 32nd year of that reign, was revived again in the first year of James II, and remained in force till the 5th of King William. When the Licensing Act expired at the close of the reign of Charles II, the twelve Judges were assembled at the King's command, to discover whether the press might not be as effectually restrained by the common law as it had been by the statute. The Judges met and resolved: (1) that it was criminal at common law not only to write public seditious papers and false news; but likewise to publish any news without a licence from the King though it was true and innocent: (2) that libels were seizable, this being found in the State Trials; 7 St. T., 929. These were the opinions of the twelve Judges of England, and not merely the opinions of Scroggs and Jefferies. If a libel can be seized, it can be searched for: if search is legal, a warrant to authorize that search is likewise legal. In the case of *Entinck* v. *Carrington*, Lord Camden, C.J., tries to get over these authorities by saying he can find no other authority to justify the seizure of a libel than that of "Scroggs and his brethren." But "Scroggs and his brethren" were the constituted Judges of the land. 19 St. Tr., 1030. 6 Geo. III, A. D. 1765. In the year 1764 and the two following years the legality of general warrants was from time to time under the consideration of Parliament. It was resolved by the Commons: (1) that a general warrant for apprehending the author, printer, or publisher of a libel is illegal: (2) that the seizing all the papers of the author, printer, or publisher of a libel is illegal. 30 Comm. Jour. pp. 753, 772, A. D. 1776. Cobbett, Parl. Hist. Vol 15, pp. 1393 *seq.*:

Vol. 16, pp. 6 *seqq.*; 207—209. See also *Huckle* v. *Money*, 19 St. Tr., 1404; *Wilkes* v. *Lord Halifax*, *ib.* 1406—1415. But a general warrant of a Secretary of State to seize papers was upheld in *Sayre* v. *Earl of Rochford*, 19 St. Tr., 1286. It seems they are permitted where treason or treasonable practices are assignable. R. v. *Despard*, 7 T. R., 736, 742: *Harrison* v. *Bush*, 5 E. & B., 353.

English cases relating to general warrants are *Leach* v. *Money*, 19 St. Tr., 1001; *Wilkes* v. *Wood*, *id.*, 1153. Had there been a *droit administratif* in England, these cases would have gone before a *Tribunal des Conflits* and might very likely have been differently decided. In such cases the ordinary tribunals are really *judices in suâ re.* The conception of the prerogative of the English Crown, which prevailed in the seventeenth century, is analogous to the administrative ideas, which still prevail on the Continent. Dicey, Const, 209, 2nd Ed.

Under 24 and 25 Vict., c. 96 (Larceny Consolidation Act), s. 103, a Justice may grant a search-warrant, as in the case of stolen goods, when any credible witness proves on oath that there is reasonable cause to suspect that any person has in his possession or on his premises, any property whatsoever, with respect to which any offence has been committed, as to forged instruments, see 24 and 25 Vict., c. 98, s. 46; as to counterfeit coin and coining implements, 24 and 25 Vict., c. 99, s. 27; as to gunpowder and explosive substances, *ib.*, c. 97, s. 55.

Power to restrict warrant.

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

Search of house suspected to contain stolen property, forged documents, &c.

98. If a District Magistrate, Subdivisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged document, false seals or counterfeit stamps or coin, or instruments, or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place,

he may by his warrant authorize any Police-officer above the rank of a constable—

(*a*) to enter, with such assistance as may be required, such place, and

(*b*) to search the same in manner specified in the warrant, and

(*c*) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials as aforesaid, and

(*d*) to convey such property, documents, seals, stamps, coins, instruments or materials before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and

(*e*) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale, or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials, knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging.

In England a Chief Officer of Police may authorise in writing the entry by a constable in any premises in search of stolen property, in either of the following cases :—

1. Where the premises are, or within the preceding 12 months have been, in the occupation of any person who has been convicted of receiving stolen property or harbouring thieves :

2. When the premises are in the occupation of any person who has been convicted of *any offence involving fraud or dishonesty* and punishable by penal servitude or imprisonment. The Chief Officer of Police may give the authority, without specifying any particular property, if he has reason to believe generally that the premises are being made a receptacle for stolen goods.—See Prevention of Crime Act, 34 and 35 Vic., c. 112, s. 16.

In Bengal wholesale dealers in bell-metal and brass utensils are sometimes receivers of stolen property. It is very difficult to bring the offence home to them, and some such provisions are required as are contained in "The Old Metal Dealers Act, 1861." Under 24 and 25 Vic., c. 110, s. 4, any Justice may issue a search-warrant, where there is reason to believe that any old metal stolen or unlawfully obtained is in any shop, &c. All metals found therein to be seized and produced, and the dealer has to appear before two Justices. *If he shall not then and there prove* to the satisfaction of such Justices how he came by the said articles, or if any of such articles have been stolen or unlawfully obtained, and it shall appear to the Justices *that he dealer had reason to believe* such fact when he received them, he is

liable to a penalty of £5, and for a subsequent offence £20, or, at the discretion of the Justices, three months' imprisonment with hard labour. The dealer is also liable to be prosecuted by indictment for feloniously and knowingly receiving stolen goods.

In India members of thieving castes are often found in possession of property obviously stolen: but if the owners cannot be found, it seems they cannot be prosecuted. See s. 222 *infra* as to the particulars to be contained in a charge. But they may in certain cases be proceeded against under s. 110. See also ss. 400, 401, P. C.

In Germany, when a person is suspected of having committed a punishable act (crime, delict, or contravention), as author, accomplice, accessory after the fact, or harbourer, his house and belongings may be searched, not only with a view to his arrest, but also in order to discover means of proof. Germ. C. P. C., 102.

No search can take place at night in inhabited houses, except in cases of flagrant delict, danger in the dwelling, or to arrest an escaped offender. But the restriction does not apply to the houses of persons under police surveillance, places where the public could go during the night (*e. g.*, inns and hotels, saving the private apartments of the hotel-keeper's family), places known to the police as serving for the refuge of bad characters or the deposit of stolen property, or known as secret gambling houses or as houses of prostitution. From the 1st April to 30th September, the night lasts from 9 P. M. to 4 A. M., and during the remainder of the year from 9 P. M. to 6 A. M. If the *Juge d' Instruction* or the *Procvreur d' Etat* be not present at the search, a municipal functionary should be present; or two inhabitants of the commune in whicl the place to be searched is situate. Germ. C. P. C., 104, 105. See s. 103.

Disposal of things found in search beyond jurisdiction.

99. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court.

C.—Discovery of Persons wrongfully confined.

Search for persons wrongfully confined.

100. If any Presidency Magistrate, Magistrate of the first class or Subdivisional Magistrate has reason to believe that any person is confined under such circumstances

that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

This section is new. See also s. 551, *infra*.

In Italy, a private person is bound to give information, if he knows that any person is illegally confined. The officer receiving the information is bound to proceed forthwith to the spot and to set free the detained person, or, if any legal cause for detention is alleged, to take him at once before a competent tribunal. All persons called upon to assist in carrying out the above provisions are bound to do so.—Ital. C. P. C., 802—804.

BENGAL SECRETARIAT LIBRARY.

D.—General Provisions relating to Searches.

Direction, &c., of search-warrants.

101. The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98 or section 100.

Persons in charge of closed place to allow search.

102. Whenever any place liable to search or inspection under this chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48.

Search to be made in presence of witnesses.

103. Before making a search under this chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search.

The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this sec-

tion shall be required to attend the Court as a witness of the search unless specially summoned by it.

Occupant of place searched may attend.

The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under the section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

In Louisiana "the search-warrant must be executed in the presence of two inhabitants of the parish, who shall sign the return as witnesses. It can only be executed in the day-time." The provisions of this section are most important. Police-officers contravening them may be prosecuted under s. 166, Penal Code, or the Police Act. The Code does not forbid searches being made at any particular time. In Italy searches cannot be made before 7 A. M., or after 5 P. M., from the 1st October to the 31st March, and during the remainder of the year before 5 A. M. or after 8 P. M. But if imminent danger would result from delay, the prohibition does not apply. If the accused person is in the place, or under arrest, he can be present at the search or appoint some one to represent him.—Ital. C. P. C., 142, 143.

In Germany the owner of the house can be present at the search; but if he places any obstacles in the way, he may be arrested. In his absence, the searching-officer should call his representative, an adult member of the family, or a neighbour. On the termination of the search, the owner must be given, if he requests it, a certificate stating the object of the search and a list of the things seized, or if nothing suspicious has been found, a certificate to that effect. If property not connected with the case but otherwise suspicious is found, it may be provisionally seized.—Germ. C. P. C., 106—108 The Austrian Code of 1873 (Article 142) forbids useless inspections during searches, or the causing of trouble or annoyance to the owner of the house beyond what is necessary. The German Legislator has considered with reason that such matters should more properly be embodied in departmental instructions rather than in the law itself.

E.—Miscellaneous.

Power to impound document, &c., produced.

104. Any Court may, if it thinks fit, impound any document or other thing produced before it under this Code.

Magistrate may direct search in his presence.

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

PART IV.

PREVENTION OF OFFENCES.

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for keeping the Peace on Conviction.

Security for keeping the peace on conviction.

106. Whenever any person accused of rioting, assault, or other breach of the peace, or of abetting the same, or of assembling armed men or taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation by threatening injury to person or property, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Subdivisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

In England it is not necessary that the recognizance should be entered into before the Court passing the order. It may be entered into before any other Court of summary jurisdiction or a clerk of the same, or before a superintendent or inspector of police or officer in charge of a Police-station, or where any of the parties is in prison, before the governor or other keeper of the prison.—(Summary Jurisdiction Act, 1879, s. 42.)

A Magistrate often deems it necessary to bind a man down to keep the peace, though no specific offence can be brought home to him. In India there is the trouble and delay of instituting a fresh proceeding under s. 107. In England, even in dismissing a charge for a common assault, the Justices may see sufficient ground in the evidence for binding over the defendant to keep the peace, though he was not summoned for that matter.—(Exp. Davis, 24 L. T., n. s., 547). Lawyers in India are much mistaken in their ineradicable

belief that the English law is *more indulgent* to an accused person than the Indian. In a case reported in "The Times" in 1885, Hawkins, J., after having dismissed a case, at once proceeded to bind down *both the prosecutor* and the defendant to be of good behaviour for one year.

B.—Security for keeping the Peace in other Cases and Security for Good Behaviour.

Security for keeping the peace in other cases.

107. Whenever a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class receives information that any person is likely to commit a breach of the peace, or to do any wrongful act that may probably occasion a breach of the peace, within the local limits of such Magistrate's jurisdiction, or that there is within such limits a person who is likely to commit a breach of the peace or do any wrongful act as aforesaid in any place beyond such limits, the Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

Where threats are indulged in, sufficient to cause serious annoyance and fear of personal injury to a person of ordinarily firm mind, the law provides a remedy, and the applicant is entitled to protection. In deciding whether a man is likely to break the peace, his past conduct is not to be overlooked —(Hawk, P. C., c. 60, s. 6; Dalton, J. P., c. 116, p. 269). Protection is also to be given when the threat assumes the form of injuring one's wife or child, though if it be made to a servant, this is deemed too remote, and the servant must himself apply for protection.—(Dalton, J. P., 116.)

Threats may be made by looks, tones, and gestures, as well as by express words; indeed, the one may often be more eloquent and cogent than the other, provided the Justices see that the complainant has acted reasonably in construing in the right way these inarticulate signs. Cases of importunate lovers are instances.—(*Dennis* v. *Lane*, 12 Mod., 132; *R.* v. *Dunn*, 12 A. & E., 599.) The Court or Justice must not be too critical, but must give ear in a great degree to the apprehensions of the party seeking the protection, *and must enter, to some extent, into his or her feelings and convictions.*

In England it has been doubted whether a libel is such a threat or provocation of violence or injury as to entitle the libelled person to demand security of the peace against his detractor. Pratt, C. J., thought not—(*R.* v. *Wilkes*, 2 Wils., 161). But it was held otherwise in 1820—(*Butt* v. *Conant*, 1 B. & B., 548). The test is whether the particular libel tends to a breach of the peace. If Justices refuse to bind over the offender, the Queen's Bench Division may be applied to; but the latter Court will always give great weight to the finding of the Justices.

In New York a person, who in the presence of a Court or Magistrate, assaults or threatens to assault another, or to commit an offence against his person or property, or who contends with another with angry words, may be at once ordered to give security, or committed, if he fails to do so.—N. Y. C. P. C., 74.

In England it seems that the truth of the facts sworn by the person who exhibits articles of the peace cannot be controverted.—*Vane's case*, 13 East, 172 n.; also *R.* v. *Doherty*, 13 East, 171. If the complainant has been accustomed to go to a particular place, rightfully, as he alleges, for the transaction of business, and has been threatened with violence if he goes there again, that is a sufficient ground for articles of the peace.—*R.* v. *Mallinson*, 16 Q. B., 367. If it appears on oath to the satisfaction of the Justices that the complainant has been threatened, it is their duty to require recognizances to keep the peace. —*Loet* v. *Hutton*, 34 L. T., 730. The superior Court will not reduce the amount of security required by Magistrates.—*R.* v. *Holloway*, 2 D. P. C., 525. But if it sees ground, it will require sureties, although the Justices have refused.—*R.* v. *Mallinson*. On motion to discharge the recognizances, on the ground that the language was used in a metaphorical sense only, the Court refused to interfere, because it was for the Magistrates to judge in what sense the language was used. —*R.* v. *Tregarthen*, 5 B. & Ad., 678.

Procedure of Magistrate, &c., not empowered to act under section 107.

108. When any Magistrate not empowered to proceed under section 107, or a Court of Session or High Court has reason to believe that any person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by detaining such person in custody, such Magistrate or Court may issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case under section 107.

A Magistrate before whom a person is sent under this section may, in his discretion, detain such person in custody until the completion of the enquiry hereinafter prescribed.

Security for good behaviour from vagrants and suspected persons.

109. Whenever a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class receives information—

(*a*) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing an offence, or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period not exceeding six months as the Magistrate thinks fit to fix.

In Germany, when a sentenced person is placed under the supervision of the high police, the latter have the right to prevent his residing in certain specified places, and at any time to make searching visits in his house, and, if he is a foreigner, they may expel him from the territory of the confederation.—G. P. C., 39.

Under the French and Belgium Penal Codes vagabondage (le vagabondage) is a delict. Vagabonds are those who have no fixed domicile or means of subsistence, and who do not habitually exercise any trade or profession. Persons declared vagabonds are, for that fact alone, punishable with three to six months' imprisonment; and on their release, they are under police supervision for from five to ten years. Strangers, declared vagabonds by Magisterial order, may be conducted outside the Republic, by the order of Government. But such vagabonds may, with the permission of Government, be reclaimed by the Municipal Council of the Commune in which they were born or bailed (cautionnés) by a substantial and solvent citizen.—Fr. P. C., 269-273. It has been ruled by the Court of Cassation that the delict of vagabondage does not cease to exist on account of the offer made by a third person to receive the prisoner and give him work.—Cass., 10th Jan., 1852. This is important. When I have had men before me for bad livelihood, a Mukhtar of my Court has sometimes offered to take the man on as his servant.

Persons found begging in places where public charities exist are punishable with from three to six months' imprisonment, and after release are conducted to the workhouse (depôt de mendicité). In other places able-bodied (valides) habitual beggars are punishable with from one to three months' imprisonment. All beggars, able-bodied or otherwise, who use threats, or enter houses or enclosures without permission, or who feign infirmities, or who beg in company with others (husband and wife, parents and their young children, the blind and their conductors excepted) are punishable with from six months to two years' imprisonment.—Fr. P. C., 274-276. Beggars or vagabonds, found carrying arms, or having keys or other instruments for commission of crime (propres à commettre) or for entry into houses, are punishable with from two to five years' imprisonment. If any beggar or vagabond is found in possession of things worth more than 100 francs, and cannot explain whence he got them, he is punishable with from six months to two years' imprisonment.—Fr. P. C., 277, *seq.*

Act V, 1861, s. 12, authorises the Inspector-General of Police to make rules relative to the organisation of the Police force, their inspection, duties, &c. Reg. XX, 1817, s. 21, declares that "the village watchmen are subject to the orders of the Police Darogahs."

But nowhere, so far as I am aware, does the law authorise the Police or the District Magistrate to make rules as to the supervision of released convicts and bad characters. Such authorisation finds a place in all other Codes. Sec. 361 of the German Penal Code punishes "those who, being placed under the supervision of the police, disobey the prohibitions of the head of the Police." There is absolutely no legal basis (unless District Magistrate can pass such orders in his executive capacity) for the present system of supervision of released convicts *Quære*,—Can the Executive Government (through the Chief of the Police) make rules on this subject? I do not presume to give an opinion on so knotty a point of constitutional law.

In the Court of Queen's Bench, on 23rd June 1871, the Lord Chief Justice affirmed a conviction of the Magistrates of Wolverhampton against persons for using in a public place a certain table, called "Pari-mutuel," or Mechanical Betting.

Police officers cannot *institute* prosecutions or rather proceedings for bad livelihood. They may either submit a report to the Magistrate; or, where the circumstances demand it, they may arrest under s. 55, C. P. C., and under s. 60, are forthwith to place the person arrested before a Magistrate. They are then *functi officio*, the proceedings under ss. 109, 110 being magisterial.

The following is a brief summary of the provisions of the Louisiana Criminal Procedure Code regarding vagrancy:—

A vagrant is one who, having no visible means of subsistence, lives in idleness, or in the practice of drinking, or gaming, and who, *by the whole of his conduct and character, gives just reason to believe that he gains his subsistence by illegal means.* On the complaint of three householders, the Magistrate shall issue his warrant and require the person to give an account of himself. *The account may be given in private, if such person requires it,* and if it shows legal means of subsistence to the satisfaction of the Magistrate, such person shall be dismissed. But if he refuses to render any account, or it be not satisfactory, he shall be required to report himself to the Magistrate, and to show, within three days, that he has adopted some regular means of livelihood, or to leave the district, or to give security for his good behaviour. If he fail to perform one of these conditions, he is to be sent to the House of Industry for sixty days, or until he find security for his good behaviour, or that he will leave the state and not return within two years. If after his discharge the party shall again be found in a state of vagrancy, either in the same or in any other district in the state, he shall, after the like inquiry, be sent to the House of Industry for six months; and the same process shall be repeated as often as the same kind of life shall be resumed. But no person is to be deemed a vagrant who, from bodily infirmity or infancy or old age, is unable to gain a livelihood by labour.

Article 973 of the New York Procedure Code declares the following persons to be vagrants:—(1) a person who, not having visible means to maintain himself, lives without employment; (2) a person who, being an habitual drunkard, neglects to support his family; (3) a person who has contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health.; (4) a common prostitute; (5) a person who wanders abroad and begs; (6) a person wandering abroad, and not giving a good

account of himself; (7) a person who appears in a public highway with his face painted, covered or concealed, or being otherwise disguised in a manner calculated to prevent his being identified. A Peace-officer must, *when required by any person*, carry a vagrant before a justice of the peace. If the Magistrate be satisfied, by confession or competent testimony, that he is a vagrant, he must convict him; and commit him, *if not a notorious offender*, and a proper object for such relief, to the poor-house *for not exceeding six months at hard labour;* or if he be an improper person to be so committed, he must be sent to jail for a like term. Art. 983 of the same Code defines who are "disorderly persons." Such persons may be required to give security to be of good behaviour for one year.

A Justice in England may imprison as a *vagrant* for one month any person able to maintain his family and refusing or neglecting to do so. He may imprison for three months as a *rogue and vagabond* any person who, having been convicted as an idle and disorderly person, (1) practises imposition by pretending to tell fortunes; (2) has no visible means of subsistence, and cannot give a good account of himself; (3) wilfully exposes his person; (4) asks for alms; (5) runs away and leaves family chargeable to the parish; (6) plays or bets in a street at any game or pretended game of chance; (7) has in his possession any implement with intent feloniously to break into any house, or has any weapon with intent to commit a felonious act; (8) is found in any dwelling house, out-house, yard, &c., for any unlawful purpose, &c.

A Justice may commit an *incorrigible rogue* to the next general or quarter sessions, and the Justices there assembled may order him to be whipped and imprisoned for one year. An incorrigible rogue is one who (1) escapes from confinement under the Act V, Geo. 4, c. 83; (2) is twice convicted as a rogue and vagabond; (3) is apprehended as a rogue and vagabond, and violently resists his apprehension. It will be seen that the Indian law as to bad characters is not so stringent as the English law; while it is far less severe than the Belgium and French law. On this point the Indian Bench have occasionally displayed considerable ignorance of English law. The so-called spirit and principles of English law are made to do a good deal of duty in eloquent orations for the defence in India.

Security for good behaviour from habitual offenders.

110. Whenever a Presidency Magistrate, District Magistrate, or Subdivisional Magistrate, or a Magistrate of the first class, specially empowered in this behalf by the Local Government, receives information that any person within the local limits of his jurisdiction is an habitual robber, house-breaker or thief, or an habitual receiver of stolen property, knowing the same to have been stolen, or that he habitually commits extortion, or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good

behaviour for such period not exceeding three years as the Magistrate thinks fit to fix.

"The question for consideration is whether the period has not arrived when the knowledge possessed by the officers of Justice may be made available for *the breaking up of those gangs* which hold us in a state of fear, and which, by the example of their impunity, obtain recruits, and spread abroad a moral pestilence."—Charge of Matthew Davenport Hill, Recorder of Birmingham, to the Grand Jury, 18th October, 1850. A learned lawyer, commenting on the above charge in the *Spectator*, says: "Two cardinal facts are admitted by all who have entered into the controversy. First, that there is a *criminal population* in existence among us, *i. e.*, a class drawing its livelihood from the produce of crime. The second cardinal fact is, that the members of this class are individually known to the police, and probably to many others. Is, then, the science and practice of jurisprudence in such a state of barbarism as not to be able to touch them with safety to the community? The policeman knows that A. B. is a thief by a number of observations, each in itself trifling, but altogether producing, and justly producing, clear conviction upon his mind. The testimony of policemen is, no doubt, to be received with caution. But what is to prevent that caution being exercised? . . . . . As every man who continues to live must be a consumer, what *can* be the hardship of calling upon him, when placed in circumstances of just suspicion, to show the sources from which his consumption is drawn? The object to be obtained is too important to justify its being abandoned on light grounds. The criminal population is partly hereditary and partly recruited by immigrants. The vices and sufferings incident to the course of life pursued by thieves have a strong tendency to diminish their number; and if there were no additions from without, the class would dwindle away, and in time perhaps become extinct. But the example of impunity, though but for a few years, puts enormous power of corruption into the hands of the veteran offender, and enables him to replenish his band whenever death or the policeman creates a vacancy. If this band were *harassed* and *broken up from day to day*, by the operation of the law directed against reputed thieves, theft must cease to be a calling—all continuity of action would be at an end. The professional life of a thief would be too short to give him the opportunity of becoming an adept in his art, and his visitations of our houses and pockets would be rare." Other great Judges and lawyers wrote and spoke in the same strain, the result of which was the passing of such Acts as the Crimes Prevention Act, and the stringent provisions relating to ticket-of-leave men, convicted felons, rogues and vagabonds, vagrants, and incorrigible rogues.

It is very generally but erroneously supposed that the Indian law as to bad characters and security for good behaviour is peculiar to India, is harsh and stringent, and opposed to the principles of the English law. This is very far from the truth. The continental law is of course far more stringent than the Indian law. On the continent many duties are performed by the executive, which the jealousy of English law entrusts to the Courts. But even in England the law as to supervision of bad characters appears to give the police greater

power than they have in India. Some judgments of the Calcutta High Court, in which the Judges (some of them barristers) appear to have been unaware of or to have overlooked the existence of certain English statutes, have strengthened and stereotyped the erroneous supposition alluded to above.

Judicial and executive officers may with advantage consult the Penal Servitude Act, 1864 (27 and 28 Vict., c. 47) and the Habitual Criminals Act, 1869 (32 and 33 Vict., c. 99). I extract the following from the Prevention of Crimes Act, 1871 (34 and 35 Vict., c. 112) :—

1. Holder of a license under Penal Servitude Acts may be arrested without a warrant, if there is *suspicion* that such holder is *getting his livelihood by dishonest means;*

2. A constable, acting on the written authority of the chief officer of police, may arrest without warrant any person who has been convicted on indictment of a *crime*, a previous conviction of a crime (whether summary or on indictment) having been proved against him, if at any time within seven years following the expiration of the last sentence there is cause for suspecting him of getting his livelihood by dishonest means;

3. It is the duty of a constable to arrest without warrant, or any special authority, any person who has been convicted on indictment of a crime, a previous conviction of a crime (summary or on indictment) having been proved against him, if at any time within seven years after the expiration of the last sentence, he is found under the following circumstances :—

(*a*) in any place, whether public or private, apparently about to commit or aid in the commission of any offence punishable on indictment or summary conviction, or wait ng for an opportunity to commit or aid in the commission of any such offence;

(*b*) in or on any dwelling-house or any building, yard, or premises attached, or in or on shop, garden, &c., or in any building in any garden, &c., without being able to account for his being on such premises.

4. Under the 8th section every convict at large on license and every person under sentence of police supervision in pursuance of the Act is required—

(*a*) To notify the place where he takes up his residence after discharge from prison:

(*b*) To notify any change of residence from one place to another within the same Police District:

(*c*) To notify any change of residence from one Police District to another.

If a male—he is also required to report himself once a month to the chief officer of police of the district, or to any other person whom such officer may appoint for the purpose.

5. *The punishment which may be incurred for failure to comply with these requisitions is in the case of a person under Police supervision one year's imprisonment;* in the case of a holder of a license, one year's imprisonment, or forfeiture of license.

6. Moreover, *twice convicted persons are liable to imprisonment with or without hard labour for one year* under any of the following circumstances :—

(1) if he is charged by a constable with, and it appears to a Court of summary jurisdiction that there are *reasonable grounds for believing* that he is getting his livelihood by dishonest means; or

(2) if, on being charged with any offence punishable on indictment or summary conviction, and on being required by a Court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or false address ; or

(3) if he is found in any place under such circumstances as to satisfy the Court that he was about to commit or aid in the commission of, or was waiting for an opportunity to commit or aid in the commission of, any offence as above ; or

(4) if he is found in or upon any dwelling-house, building, yard, shop, orchard, garden, &c., without being able to account to the satisfaction of the Court for his being found on such premises.

Similar provisions to the above might with advantage be extended to India. See notes under the previous section as to the French, German, and American law, and also the English law as to vagrants, rogues and vagabonds, and incorrigible rogues.

The English law as to sureties for good behaviour used to be very wide. For some centuries the Justices of the Peace extended their powers of imprisoning to persons whose conduct did not cause any breach of the peace, though in other respects suspicious and reprehensible (Crompt., 121, 126 ; Fitz., 7). Dalton tells us that he had, as Justice, once ordered sureties for good behaviour from a man who bought ratsbane and mixed it with corn to poison his neighbour's fowls, and "the whole bench" held it to be a very good reason, and so did the Judges of Assize in like cases (Dalt., c. 124). Certainly it is a pity that the words "dangerous character" have been left out of the present code. Professional incendiaries, forgers, cattle poisoners, case-mongers, and false witnesses cannot now be called on under this section to give security, though s. 109 (*b*) might in some cases be applicable. Hawkins (1716) said that a Justice had a discretionary power to take surety for good behaviour from all those whom he had just cause to suspect to be "*dangerous, quarrelsome*, or *scandalous.*" In 1808 the Judges gave a unanimous opinion that *on conviction for a misdemeanour* the Court might order the defendant to give security for his good behaviour for a reasonable time (*R. v. Hart*, 30 St. Tr., 1131, 1344). In some cases of libel against private individuals, Justices may bind the party to his good behaviour (Haylock *v.* Sparke, 1 E. & E., 471).

In India there appears to be no legal authority for the police supervision of released convicts. These men sometimes present petitions to the Magistrate, asking that they may be released from police supervision, on the ground that they are living as ordinary members of society and earning an honest livelihood. The jurisdiction of the Magistrate in such matters is purely administrative or executive. As a matter of practice, such petitions are generally sent to the District Superintendent of Police for report as to whether the petitioner's name may properly be struck off the Register of Bad Characters. In the French Criminal Procedure Code a separate chapter is devoted to the subject of the restoration of convicted persons to all the rights and privileges they possessed before conviction (la réhabilitation des condamnés). C. P. C. Bk. ii. tit. vii, chap. iv. Those who have been condemned to a severe or degrading punishment (peine afflictive ou infamante) cannot demand rehabilitation until the expiry of five years from the day of their release ; the period is only three years in the case of those who have suffered a correctional punishment (peine correc-

tionelle). In the case of those sentenced to civic degradation or to police supervision as the principal punishment, the above period counts from the date on which the conviction became final. Those who have been twice convicted of crimes are not permitted to demand rehabilitation. The order for rehabilitation removes all disabilities which have resulted from the conviction, except such as may have been pronounced under article 612 of the Code of Commerce. The demand for rehabilitation is made in the first instance to the Procureur of the Republic. He takes the opinion of the Municipal Committee and Mayor of the Commune, and of the *Juge de paix* of the Canton, and then sends his report to the Procureur General. The matter is then laid before the *Chambre d' accusation*, who give their opinion, after hearing the Procureur General. If the opinion is unfavourable to the petitioner, the demand cannot be renewed till after a lapse of two years. If it is favourable, the record is sent without delay to the Minister of Justice, who may consult the Court which pronounced the conviction. Finally, the President of the Republic decides on the report of the Minister of Justice. The Court of Cassation have ruled that they have no power to review the decisions of the Chambres d' accusation, as they have not the character of final judgments, but are merely opinions. Cass., 1st September 1853; 18th January 1867. In France, Belgium, and Germany, the order for police supervision is one of the specified punishments which may be awarded under the Penal Code.

Proviso as to European vagrants.

111. The provisions of sections 109 and 110 do not apply to European British subjects in cases where they may be dealt with under the European Vagrancy Act, 1874.

But under s. 30 of the Vagrancy Act, a European who has once been declared a vagrant may, in the Mofussil, be dealt with under these provisions.

Order to be made.

112. When a Magistrate, acting under section 107, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Procedure in respect of person present in Court.

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court:

Summons or warrant in case of person not so present.

Provided that whenever it appears to such Magistrate, upon the report of a Police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

Copy of order under section 112 to accompany summons or warrant.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

Power to dispense with personal attendance.

"Pleader," see s. 4 (*n*), *supra*.

117. When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which he has acted, and to take such further evidence as may appear necessary.

Inquiry as to truth of information.

Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials in summons-cases; and where the order requires

security for good behaviour, in the manner hereinafter prescribed for conducting trials in warrant-cases, except that no charge need be framed.

For the purposes of this section, the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise.

In Louisiana the *onus* of proof is thrown on the accused. "If he fail in showing that the application is groundless, the Magistrate shall direct him to give bond with sufficient security that he will commit no offence against the person or property of the complainant." Lou. C. P. C., 25.

Article 29 enacts that at any time within the last month of the operation of the bond, the complainant may renew his application, and the order for security may be renewed on the oath of the party, declaring that he still fears the execution of the prisoner's former designs, provided the Magistrate, after hearing the circumstances of the case, shall deem such fear "well-founded." Article 30 enacts that "any Magistrate who is present when any offence, accompanied with violence, is committed, may, *without any further proof*, order the offender to be arrested, and compel him to give security in the manner above directed to refrain from the exercise of any illegal force."

In India a person, called on to give security, is allowed an opportunity of shewing cause. Cases under section 107 are treated as summons-cases and the offender must bring his own witnesses. The Magistrate is not bound to issue any process. In England a defendant cannot even *contradict the facts on which the application is founded.* The application is an *ex parte* proceeding to this extent, that the Court or Justices, on being satisfied with the complainant's affidavit or information, will not listen to any defence which contradicts or impugns the accuracy of his statements, neither will the Queen's Bench Division entertain an application to discharge the recognisances taken before Justices *on any matter touching the merits of the case as put before the Justices* (see Paterson Comm. Lib. i., 196). This may seem unjust, but the matter is regarded as so urgent, that no delay or cavilling about facts can be tolerated. The responsibility is entirely thrown on the complainant, whose personal apprehensions cannot indeed be easily measured or reported at the moment, but who may afterwards be called to answer for any wilfully false statements. But Messrs. Sanders and Glen think that since the passing of the Summary Jurisdiction Act of 1879, sec. 25, the defendant may give evidence to contradict the facts stated in complainant's affidavit. See Hume's Scotch Law as to proceedings *in lawburrows.*

Order to give security.

118. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly :

Provided—

first—that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112:

secondly—that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive:

thirdly—that when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

It has been held in England that a contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default and at the expiration of that period is to be returned.—15 Q. B. D., 561.

Discharge of person informed against.

119. If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

C.—Proceedings in all Cases subsequent to Order to furnish Security.

Commencement of period for which security is required.

120. If any person in respect of whom an order requiring security is made under section 106 or section 118 is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

In other cases such period shall commence on the date of such order.

Contents of bond.

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case

may be, and in the latter case, the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Power to reject sureties.

122. A Magistrate may refuse to accept any surety for good behaviour offered under this chapter, on the ground that, for reasons to be recorded by the Magistrate, such surety is an unfit person.

Imprisonment in default of security.

123. If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison, until such period expires or until within such period he gives the security to the Court or Magistrate which or who made the order requiring it, or to the officer in charge of the jail in which the person so ordered is detained.

Proceedings when to be laid before High Court or Court of Session.

When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison, pending the orders of the Court of Session, or, if such Magistrate be a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

Such Court, after examining such proceedings and requiring any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit: Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

Kind of imprisonment.

Imprisonment for failure to give security for keeping the peace shall be simple.

Imprisonment for failure to give security for good behaviour may be rigorous or simple as the Court or Magistrate in each case directs.

Power to release persons imprisoned for failing to give security.

124. Whenever the District Magistrate or a Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this chapter, whether by the order of such Magistrate or that of his predecessor in office, or of some Subordinate Magistrate, may be released without hazard to the community or to any other person, he may order such person to be discharged.

Whenever the District Magistrate or a Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this chapter as ordered by the Court of Session or High Court may be released without such hazard, such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court, as the case may be, and such Court may, if it thinks fit, order such person to be discharged.

Power of District Magistrate to cancel any bond for keeping the peace.

125. The District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace executed under this chapter by order of any Court in his District not superior to his Court.

Discharge of sureties.

126. Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class to cancel any bond executed under this chapter within the local limits of his jurisdiction.

On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

When such person appears or is brought before the Magistrate, such Magistrate shall cancel the bond, and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123, and 124, be deemed to be an order made under section 106 or section 118, as the case may be.

CHAPTER IX.

UNLAWFUL ASSEMBLIES.

Assembly to disperse on command of Magistrate or Police-officer.

127. Any Magistrate or officer in charge of a Police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

This section applies to the Police in the towns of Calcutta and Bombay.

See notes under s. 42, *supra*, and s. 142, Penal Code.

As to assemblies on the highway, it has been ruled in England that the use of a highway is confined, both by statute and by common law, strictly to the one primary use of a place of passsage, and is not for stationary employments.—*R.* v. *Carlile*, 6 C. & P., 637; *R.* v. *Moore*, 3 B. & Ad., 184; *R.* v. *Cross*, 3 Camp., 226. All other uses than that of travelling are deemed abuses, and are usually punishable with a penalty as being wilful obstructions to this right of public passage.—5 & 6 Will. IV., c. 50, s. 72. See Bombay Salvation Army Case, I. L. R., 7 Bom., 42.

A member of an unlawful assembly is liable to six months' imprisonment. If he joins or continues in it after he knows it has been commanded to disperse, the punishment may be two years under s. 145, P. C. So in England a riot or illegal meeting is none the less so, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a transportable offence, if they do not disperse within an hour; but if that proclamation is not read, the common law offence remains, which is a misdemeanour.—*R.* v. *Fursey*, 6. C. & P., 81.

As to the duties of the Magistracy in England, a Magistrate called on to suppress a riot is required by law to do all that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances.—*R.* v. *Pinney*, 5 C. & P., 254. It is no defence to say he was afraid, unless his fear arose from such danger as would affect a firm man.—*R.* v. *Kennett*, 5 C. & P., 282. It is not only lawful for Magistrates to disperse an unlawful assembly, even when no riot has occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty.—*R.* v. *Neale*, 9 C. & P., 431.

The procedure under this chapter is substantially the same as under the English Riot Act, except that (1) what is only common practice in England is here expressly provided by law, namely, that military force is not to be called upon until the civil force has failed, and (2) soldiers obeying their superior officers are absolutely protected against any penal consequences.

Use of civil force to disperse.

128. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a Police-station, whether within or without the Presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Use of military force.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present, may cause it to be dispersed by military force.

Duty of officer commanding troops required by Magistrate to disperse assembly.

130. When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary, to arrest and confine in order to disperse the assembly or to have them punished according to law.

Every such officer shall obey such requisition in such manner as he thinks fit; but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

Power of Commissioned Military officers to disperse assembly.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assem-

bly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

Protection against prosecution for acts done under this chapter.

132. No prosecution against any Magistrate, Military officer, Police-officer, soldier or volunteer for any act purporting to be done under this chapter shall be instituted in any Criminal Court, except with the sanction of the Governor-General in Council; and

(*a*) no Magistrate or Police-officer acting under this chapter in good faith,

(*b*) no officer acting under section 131 in good faith,

(*c*) no person doing any act in good faith in compliance with a requisition under section 128 or section 130, and

(*d*) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which under military law he was bound to obey,

shall be deemed to have thereby committed an offence.

Under the Louisiana Penal Code the order of a military superior is justification or excuse for the commission of a misdemeanour, but not of a crime.—Lou. P. C., 37.

This section is one of the instances of a sort of *droit administratif* in India.

"In good faith." An official may examine if the order he receives is regular in form, *i. e.*, if it is one which his superior is by his office entitled to give, and not due to some caprice, and if it is within the sphere of his own office to execute: he may further refuse to carry out an order which is not signed, if a signature is required. He is a public functionary, and not a private servant, and is therefore competent to examine the form of orders as a test of their legality. If the question of competency is doubtful, and the superior affirms his right to give the order, the inferior must obey.....an official should not fail to save his superiors and the State from mistakes, but if the superior abides by his orders, obedience is due, and the superior must bear the responsibility. Article 161 of the Hanoverian Constitution is as follows: "An order issued in proper form by a superior official imposes no responsibility on the inferior who receives it, but on the superior who issues it." So in the Constitution of Meiningen, 104, and of Altenberg, 37: "The responsibility for every illegal act belongs to him who orders it. The orders of a higher official are only an excuse if they are in proper form, and have been issued by a competent authority, who then becomes responsible for them."—Bluntschli, 508, 509.

CHAPTER X.

PUBLIC NUISANCES.

Conditional order for removal of nuisance.

133. Whenever a District Magistrate, a Subdivisonal Magistrate, or, when empowered by the Local Government in this behalf, a Magistrate of the first class, considers, on receiving a report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river, or channel which is or may be lawfully used by the public, or from any public place, or

that any trade or occupation, or the keeping of any goods or merchandize, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed or prohibited, or

that the construction of any building, or the disposal of any substance as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence its removal, repair, or support is necessary, or

that any tank, well, or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public,—

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandize, or owning, possessing, or controlling such building, substance, tank, well or excavation, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to suppress or remove such trade or occupation; or

to remove such goods or merchandize; or

to prevent or stop the construction of such building; or

to remove, repair or support it; or

to alter the disposal of such substance; or

to fence such tank, well or excavation, as the case may be; or

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by

the order, and move to have the order set aside or modified in manner hereinafter provided.

No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A 'public place' includes also property belonging to the State; camping grounds, and grounds left unoccupied for sanitary and recreative purposes.

In England a right of way arises either by express grant, or by prescription, or by necessary implication. It is called the servitude of passage in Scotland, and is distinguished into *iter* (footway and bridle-way), *actus* (drift-way for cattle), and *via* (way for carriages, &c.) In England the right of driving carts does not of necessity imply the right of driving cattle, but in Scotland it is otherwise. The servient owner may be bound by tenure or prescription to repair the way. In Scotland he may alter the course of a road (if equally convenient to the dominant owner), but in England the consent of the dominant owner is necessary. A private right of way, confined to a few individuals, is called an easement; but *every way* (footway or otherwise) *which is common to the public, is called a highway.* In England, when a private right of way is obstructed, an action at law is the proper remedy; and an indictment, when a highway is obstructed. In the latter case there is a common law right to remove the obstruction. In India s. 147, *infra*, applies to infringement of easements. See Paterson English and Scotch Law, p. 95, and cases quoted.

In England a Surveyor of Highways may take down or remove any encroachment on a highway.—5 & 6 Will. IV., c. 50, s. 69.

Service or notification of order.

134. The order shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons.

If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

Person to whom order is addressed to obey,

135. The person against whom such order is made shall—

(*a*) perform, within the time specified in the order, the act directed thereby; or

or show cause or claim jury.

(*b*) appear in accordance with such order, and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper.

136. If such person does not perform such act or appear and show cause, or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code; and the order shall be made absolute

Consequence of his failing to do so.

137. If he appears and shows cause against the order, the Magistrate shall take evidence in the matter.

Procedure where he appears to show cause.

If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

If the Magistrate is not so satisfied, the order shall be made absolute.

138. On receiving an application under section 135 to appoint a jury, the Magistrate shall—

Procedure where he claims jury.

(*a*) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(*b*) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and

(*c*) fix a time within which they are to return their verdict.

139. If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any).

Procedure where jury finds Magistrate's order to be reasonable.

In other cases, no further proceedings shall be taken.

140. When an order has been made absolute under section 136, or section 137, or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code.

Procedure on order being made absolute.

Consequences of disobedience to order.

If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods, or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

No suit shall lie in respect of anything done in good faith under this section.

Procedure on failure to appoint jury or omission to return verdict.

141. If the applicant by neglect or otherwise prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by section 140.

Injunction pending inquiry.

142. If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury.

In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

Magistrate may prohibit repetition or continuance of public nuisances.

143. A District Magistrate or Subdivisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.

See s. 291, Penal Code.

Under s. 144 a District Magistrate could forbid a procession or the use of music on a road, licences being required by ss. 30—33 of Act V. of 1861 (Police Act), and District Magistrates having a general control over such matters. In England a bye-law was held not to be reasonable. which was made by a council under the Municipal Corporations Act, 1882, s. 23, and imposed a penalty on "every person who in any street shall sound or play upon any musical or noisy instrument, or shall sing, recite, or preach in any street without having previously obtained a licence in writing from the Mayor." Munro *v.* Watson, L. T. (N.), 12, 3, 87. A rural sanitary authority purporting to act under the powers of ss. 44 and 276 of the Public Health Act, 1875, by bye-law prohibited the keeping of swine within fifty feet of any dwelling-house. Held to be unreasonable and therefore bad.—*Heap* v. *Burnley Union*, 12 Q. B. D., 617.

Mr. Pollock (Torts, 344) says: "The most efficient and flexible remedy is that of injunction. Under this form the Court can prevent that from being done which, if done, would cause a nuisance; it can command the destruction of buildings, or the cessation of works, which violate a neighbour's rights; where there is a disputed question of right between the parties, it can suspend the operations complained of until that question is finally decided; and its orders may be either absolute or conditional upon the fulfilment by either or both of the parties of such undertakings as appear just in the particular case." Some of these powers of a superior Court of law are in India possessed by Magistrates.

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE.

Power to issue order absolute at once in urgent cases of nuisance.

144. In cases where, in the opinion of a District Magistrate, a Subdivisional Magistrate, or of any other Magistrate specially empowered by the Local Government or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order, stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession, or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, or danger to human life, health or safety, or a riot or any affray.

An order under this section may, in cases of emergency, or in cases where the circumstances do not admit of the

serving in due time of a notice upon the person against whom the order is directed, be passed *ex-parte*.

An order under this section may be directed to a particular individual, or to the public generally, when frequenting or visiting a particular place.

Any Magistrate may rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office.

No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.

CHAPTER XII.

DISPUTES AS TO IMMOVEABLE PROPERTY.

Procedure where dispute concerning land, &c., is likely to cause breach of peace.

145. Whenever a District Magistrate, Subdivisional Magistrate, or Magistrate of the first class, is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any tangible immoveable property, or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims a respects the fact of actual possession of the subject of dispute.

Inquiry as to possession.

The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties is then in such possession of the said subject.

Party in possession to retain possession until legally evicted.

If the Magistrate decides that one of the parties is then in such possession of the said subject, he shall issue an order declaring such party to be entitled to retain posses-

sion thereof until evicted therefrom in due course of law, and fordidding all disturbance of such possession until such eviction

Nothing in this section shall preclude any party so required to attend from showing that no such dispute as aforesaid exists or has existed: and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed.

Power to attach subject of dispute.

146. If the Magistrate decides that none of the parties is then in such possession, or is unable to satisfy himself as to which of them is then in such possession, of the subject of dispute, he may attach it until a competent Civil Court has determined the rights of the parties thereto, or the person entitled to possession thereof.

Disputes concerning easements, &c.

147. Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right to do or prevent the doing of anything in or upon any tangible immoveable property situate within the local limits of his jurisdiction, he may inquire into the matter; and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done or claiming that such thing may be done, obtains the decision of a competent Civil Court adjudging him to be entitled to prevent the doing of, or to do, such thing, as the case may be:

Provided that no order shall be passed under this section, permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exercisable only at particular seasons, unless the right has been exercised during the season next before such institution.

Local inquiry.

148. Whenever a local inquiry is necessary for the purposes of this chapter, any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written

instructions consistent with the law for the time being in force as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

The report of the person so deputed may be read as evidence in the case.

Order as to costs.

When any costs have been incurred by any party to a proceeding under this chapter for witnesses' or pleaders' fees, or both, the Magistrate passing a decision under section 145, section 146, or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. All costs so directed to be paid may be recovered as if they were fines.

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE

Police to prevent cognizable offences.

149. Every Police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent the commission of any cognizable offence.

See ss. 42 (*b*) and 54.

Hurt (s. 323, P. C.) is not now a cognizable offence. But by s. 23 of Act V. of 1861 (Police Act), it is the duty of the police to prevent all offences. Where a man in the presence of a constable raised a shovel as if to strike his wife, swearing he would have murdered her but for the presence of the constable, and afterwards for about twenty minutes continued to use violent language towards his wife and then left his house professing an intention of going to his father's to sleep, and after he had gone a few yards the constable arrested him, he was held justified in doing so.—*R.* v. *Light*, 27 L. T. (M. C.), 1.

Information of design to commit such offences.

150. Every Police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the Police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Arrest to prevent such offences.

151. A Police-officer, knowing of a design to commit any cognizable offence, may arrest, without orders from a Magistrate and without a warrant, the person so

designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Prevention of injury to public property.

152. A Police-officer may, of his own authority, interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immoveable, or the removal or injury of any public landmark, or buoy or other mark used for navigation.

Inspection of weights and measures.

153. Any officer in charge of a Police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures, or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures, or instruments for weighing, which are false.

If he finds in such place any weights, measures, or instruments for weighing which are false. he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV.

Information in cognizable cases.

154. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

Sometimes complainants, after giving information, refuse to charge. In England, if from this or any other cause a charge is not received, an entry of the particulars is to be made in a "Refused Charge Book' kept for the purpose.

155. When information is given to an officer in charge of a Police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid, the substance of such information and refer the informant to the Magistrate.

Information in non-cognizable cases.

No Police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Investigation into non-cognizable cases.

Any Police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a Police-station may exercise in a cognizable case.

156. Any officer in charge of a Police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

Investigation into cognizable cases.

No proceeding of a Police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

157. If, from information received or otherwise, an officer in charge of a Police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall proceed in person, or shall depute one of his subordinate officers to proceed, to the spot to investigate the facts and circumstances of the case, and to take such measures as may be necessary for the discovery and arrest of the offender:

Procedure where cognizable offence suspected.

Provided as follows:—

(*a*) When any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of

Where local investigation dispensed with.

a Police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot:

Where Police-officer in charge sees no sufficient ground for investigation.

(*b*) If it appear to the officer in charge of a Police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

In each of the cases mentioned in clauses (*a*) and (*b*), the officer in charge of the Police-station shall state in his said report his reasons for not fully complying with the requirements of the first paragraph of this section.

In France, in cases of flagrant delict, the Procureur of the Republic is bound to go to the spot at once in order to prepare the proofs (*procès-verbaux*) necessary to establish the *corpus delicti*, &c., and to receive the statements of persons who may have been present, or who may have information to give. He reports his departure to the *Juge d' Instruction*. He is empowered to examine the neighbours, who are required to sign their statements. He may forbid anyone to leave the house, or to depart till after the completion of the *procès-verbaux*. He has to seize weapons and generally anything which may throw any light on the matter. He has to question the accused regarding such things. He may seize all papers, documents, and effects in the house of the accused, if the nature of the offence is such that proof is likely to be obtained thereby.—C. P. C., 32–37. The above procedure should take place in presence of the accused, but his absence is not an irregularity which vitiates.—*Ib.*, 39; Cass., 17th September, 1840. The Procureur must interrogate the accused immediately the latter is brought before him.—*Ib.*, 40. He must take with him, if necessary, one or two persons presumed, by their art or profession, to be capable of appreciating the nature and circumstances of the offence.—*Ib.*, 43. Doctors or other experts, who refuse to accompany the Procureur, are punishable under the Penal Code.—Cass., 6th August, 1836. The Procureur must transmit without delay to the *Juge d' Instruction*, the *procès-verbaux*, exhibits, documents, &c.—*Ib.*, 45. In cases of flagrant delict, the *Juge d' Instruction* may act as the Procureur, and may do again whatever the Procureur has done. In other cases, he cannot do anything without communicating with the Procureur; but he may, if there be occasion, issue a warrant of arrest. If he goes to the spot, he must take the Procureur with him.—*Ib.*, 59–62.

"To investigate the facts and circumstances of the case, and to take such measures as may be necessary for the discovery and arrest of the offender." The Italian Code of Criminal Procedure has a very valuable chapter on the mode of rendering certain the *corpus delicti*. The following is a summary of some of the principal provisions:—The *Juge d' Instruction*, where punishable acts have left permanent traces, shall verify them by inspecting the place, shall make a memorandum of everything which can indicate the nature or existence of the act, and shall secure all things which may tend either to the inculpation or exculpation of the person charged. He can forbid anyone to go out of the house or leave the place where the deed has been committed

(disobedience without lawful excuse being punishable). Arms, instruments, or objects, which might have been used in the commission of the offence shall be seized, as well as papers and other documents which may help to manifest the truth. In cases of homicide, body may be disinterred. The identity of the body is to be established by a *procès-verbal* after examination on oath of persons who knew the deceased. When the body, wounds thereon, &c., cannot be examined owing to decomposition, the statements of witnesses shall be recorded who saw the body before it was decomposed. In cases where the body is not forthcoming, the Judge will certify the anterior existence of the person, the time since when nothing has been heard of him, and the manner in which the body *might have been* taken away or destroyed. He will also collect all proofs which can supply verification of the fact of the offence. Experts are to be examined as to the cause of death. In the case of wounded persons, the experts are to say if the wounds are mortal or dangerous, when probably inflicted, and how long it will take to cure them.—Ital. C. P. C., 121—131.

Reports under section 157 how submitted.

158. Every report sent to a Magistrate under section 157 shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order, appoints in that behalf.

Such superior officer may give such instructions to the officer in charge of the Police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

In France, complaints are ordinarily made before the *Juge d' Instruction*, but complainants are only considered as civil parties, if they so declare themselves. Complaints made to auxiliary officers of police are sent to the Procureur of the Republic, who sends them on, as well as complaints made to himself, to the *Juge d' Instruction*.—C. P. C., 63-66.

Power to hold investigation or preliminary inquiry.

159. Such Magistrate, on receiving such report, may, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold an investigation or preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

No one would have a right to be present at an investigation or inquery under this section. In the case of *Garnett* v. *Ferrand*, Lord Tenterden, C. J., said: "They (Coroners' inquiries) are preliminary inquiries which may or may not end in the accusation of particular individuals; it may be requisite that particular persons should not in so early a stage be informed of the suspicions which may be entertained against them, and of the evidence on which such suspicions are

founded, lest they should elude justice by flight, *by tampering with witnesses or otherwise.* Cases also occur in which privacy may be necessary for the sake of decency; others in which it may be due to the family of the deceased. Who, then, is to decide whether privacy be necessary or proper? We answer, the Coroner, and the Coroner alone, and that the propriety of his decision cannot be questioned in any action. Even where absolute privacy may not be required, the exclusion of particular persons may be necessary or proper. Who, then, is to decide upon this? We again answer, the Coroner, and the Coroner alone, and the reason of his decision cannot be tried in an action... the power of exclusion is necessary to the due administration of justice."—6 B. & C., 611. See notes under ss. 174, 352, *infrà.*

Police-officer's power to require attendance of witnesses.

160. Any Police-officer making an investigation under this chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

In France, if a witness does not attend at the requisition of the *Juge d' Instruction*, the latter without other formality or delay, and without appeal, can fine him 100 francs, and may compel his appearance by force.—C. P. C., 80.

Examination of witnesses by police.

161. Any Police-officer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and *may* reduce into writing any statement made by the person so examined.

Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

The *Juge d' Instruction* in France hears the witnesses separately and in the absence of the accused. The witnesses are sworn, and are asked if they are the servants, parents, or relations of the parties. Their statements are read over to them and signed by them. —C. P. C., 73, 75, 76. Omission to take the oath does not vitiate the procedure.—Cass., 7th and 4th June, 1812; 14th June, 1866. Children under 15 need not be sworn.

"May examine orally any person supposed to be acquainted with the facts and circumstances of the case." The investigating officer in Italy has the power to summon and examine expert witnesses. If they refuse, without just cause, to lend their assistance and give their opinion, they can be fined 100 francs and suspended from the exercise

of their art or profession under s. 307 of the Penal Code. See Ital. C. P. C., 152—159. It is only necessary for the *Juge d' Instruction* to hear those witnesses, who are necessary to establish the fact, its authors, the principal agents and accomplices, and the circumstances connected with it.—*Id.*, 161. Witnesses are to be questioned as to the value of their property, and if they are in any way related to, or the servants, creditors, or debtors of either party.—*Id.*, 172. Any witness, who does not appear after citation, can be fined 20 francs by the *Juge d' Instruction*, who can also compel his appearance by force, without prejudice to the punishments prescribed in the Penal Code. —*Id.*, 176—178.

In Italy, the *Juge d' Instruction* interrogates the persons who should be heard in the course of the inquiry. Insidious questions are forbidden. The answers are written down by the notary (greffier), and signed by the person interrogated.—Ital. C. P. C., 85.

In Germany the accused is questioned during the preliminary investigation, and such interrogatory must not take place in the presence of the public minister or of the defender of the accused, on the ground that the presence of the former may intimidate, and the latter may suggest answers to his client and so frustrate the ends of justice. And when witnesses are examined, the *Juge d' Instruction* may prohibit the presence of the accused, when he thinks that his presence may prevent a witness from speaking the truth.—Germ. C. P. C., 190, 192.

"Other than questions, &c." So most Continental Codes, *e. g.*, Germ. C. P. C., 54. The Austrian Procedure Code (153) goes much farther, and permits a witness to refuse to answer, if there must result from his statement a direct and important prejudice, material or moral, to his own fortune or person or to that of his relatives.

Statements to police not to be signed or admitted in evidence.

162. No statement, other than a dying declaration, made by any person to a Police-officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it, or shall be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of section 27 of the Indian Evidence Act, 1872.

No inducement to be offered.

163. No Police-officer or person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

But no Police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this chapter any statement which he may be disposed to make of his own free will.

In Italy an accused, who is arrested on a warrant, or who appears voluntarily or on a summons before the *Juge d' Instruction*, must be questioned immediately or within 24 hours at the latest. He will be

asked to state exactly what evidence he has to show his innocence; if he recognizes the things constituting the *corpus delicti;* how they were in his possession; and generally on every question, which may tend to manifest the truth.—Ital. C. P. C., 231—235. Article 241 contains a useful provision regarding identifications. If the injured party is doubtful, the defendant is to be placed among a number of other persons resembling him in appearance. The defendant is not to be shown the person who is to identify him, and the latter is not to be brought in until the defendant has taken up his position. Magistrates in India often adopt this procedure to test identifications during the trial of a case.

As to confessions, see secs. 25, 26, Evidence Act, which refer to pure confessions. Admissions are always receivable. A free statement, amounting to a confession, should also be receivable, as in English law. If a prisoner chooses to say something, it is the duty of the constable to hear what he has to say.—(2 Cox., C. C., 378.) Where a police constable, who apprehended the prisoner, having told him the nature of the charge, said "he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him;" and the prisoner thereupon made a confession: *Held* receivable.—*Reg.* v. *Baldey*, 2 Den. C. C., 430. What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself is receivable against him.—*Rex* v. *Simson*, 6 C. & P., 540. A statement, made by a prisoner when he is drunk, is receivable in evidence; and *semble*, that if a constable gave him liquor to make him so, in the hope of his saying something that will not render his statement inadmissible, but it will be matter of observation for the Judge in his summing up.—*R.* v. *Spilsbury*, 7 C. & P., 187. Where a prisoner in jail wrote a letter to his father and gave it to the turnkey to post for him, and the turnkey transmitted it to the prosecutor: *Held*, that the letter was admissible against the prisoner, notwithstanding the manner in which it was obtained.—*R.* v. *Derrington*, 2 C. & P., 418.

The following is taken from the Metropolitan Police Orders:—"Any *confession* or statement made by the accused to a constable or other person in authority is *admissible as evidence against him*, provided no promise or inducement has been held out. With regard to confessions to other persons, they are admissible even where there have been threats. A constable may question a prisoner, but it is better in general that this should not be done. Any fact discovered in consequence of information obtained by a promise, threat or inducement, may be given in evidence."

The prisoners H. and C. were taken into their master's (the prosecutor's room), where there were two policemen. The prosecutor said, "I presume you know who these gentlemen are?" He said "yes." The prosecutor then said to H., "I know what has been going on between you and C. for sometime; you had better speak the truth." H. then made a confession: *Held*, that the confession was not admissible in evidence.—*Reg.* v. *Hatts*, 49 L. T., 780. Upon the trial of a prisoner for feloniously receiving stolen property, a list of the stolen articles which the prisoner (who was a marine store-dealer) had bought, was received in evidence in order to show that he had bought at an under-value. The list was written under the following circumstances:—A police-constable asked the prisoner to

consider when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife, in her husband's presence, handed to another constable the list tendered in evidence, saying in her husband's hearing "This is a list of what we bought, and what we gave for them." The question reserved was whether such list was properly admitted in evidence :—*Held* by the Court, that the list was clearly admissible in evidence.—*Reg.* v. *Mallory*, 13 Q. B. D., 33.

The interrogatory of the accused by the *Juge d' Instruction* is one of the most characteristic parts of the French Procedure. Sir James Stephen says : "The interrogatory is secret, the accused is not allowed to have counsel present. . . . . When the *Juge d' Instruction* has completed his inquiries, he must inform the *Procureur de la Republique* of the fact, and the latter must, within three days, make such requisitions as he thinks fit of the *Juge d' Instruction*. The latter must deliver an interlocutory judgment (ordonnance) on these requisitions. If he thinks that the facts proved do not amount to an offence against the law, or that the probability of the guilt of the accused is insufficient to put him on his trial, the judgment may be that "il n'y a pas lieu de poursuivre," upon which the defendant is set at liberty. If the offence is regarded as a *contravention*, the prisoner must, if in custody, be set at liberty, but sent before the tribunal of police. If the offence is a *délit*, the prisoner must be sent before the Correctional Court. If there is evidence enough to put the accused on his trial for a *crime*, he must order the documents in the case and a list of the exhibits to be sent to the *Procureur-Général* or the *Cour d' appel*. . . The *Procureur-Général* then makes an oral or written report to the *chambre d' accusation*. The *chambre d' accusation* considers the whole matter, and may either discharge the suspected person, or make an order for his trial by the *Cour d' assises*, or other competent Court, according as they consider the matter charged to amount to a *crime*, *délit*, or *contravention*."—Steph. Cr. Law, i., 532, *seq.*

In England it may be said that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority.—*R.* v. *Taylor*, 8 C. & P., 733. A confession to a chaplain was received.—*R.* v. *Gilham*, 1 M. C. C., 186. But in *R.* v. *Spencer* (7 C. & P. 766), there was a difference of opinion among the Judges as to whether a confession was receivable, made after an inducement held out by a person without authority.

Power to record statements and confessions.

164. Any Magistrate not being a Police-officer may record any statement or confession made to him in the course of an investigation under this chapter, or at any time afterwards before the commencement of the inquiry or trial.

Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is in his opinion best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner

provided in section 364, and shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily ; and when he records any confession he shall make a memorandum at the foot of such record to the following effect:—

"I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it, and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate."

Search by Police-officer.

165. Whenever an officer in charge of a Police-station, or a Police-officer making an investigation, considers that the production of any document or other thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, and there is reason to believe that a person to whom a summons or order under section 94 has been or might be issued will not or would not produce such document or other thing as directed in the summons or order, or when such document or other thing is not known to be in the possession of any person, such officer may search, or cause search to be made, for the same, in any place within the limits of the station of which he is in charge, or to which he is attached.

Such officer shall, if practicable, conduct the search in person.

If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the document or other thing for which search is to be made and the place to be searched ; and such subordinate officer may thereupon search for such thing in such place.

The provisions of this Code as to search-warrants shall so far as may be, apply to a search made under this section.

As to search in the house of accused, seizure of weapons, papers, exhibits, &c., the *Juge d' Instruction* in France has the same powers as the Procureur of the Republic.—See under s. 157, *supra*.

166. An officer in charge of a Police-station may require an officer in charge of another Police-station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made within the limits of his own station.

When officer in charge of Police-station may require another to issue search-warrant.

Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

167. Whenever it appears that any investigation under this chapter cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation is well-founded, the officer in charge of the Police-station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

Procedure when investigation cannot be completed in twenty-four hours.

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

If such order be given by a Magistrate other than the District Magistrate or Subdivisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

168. When any subordinate Police-officer has made any investigation under this chapter, he shall report the result of such investigation to the officer in charge of the Police-station.

Report of investigation by Subordinate Police-officer.

Release of accused when evidence deficient.

169. If, upon an investigation under this chapter, it appears to the officer in charge of the Police-station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.

In France, where the *Juge d' Instruction* is of opinion that the act does not amount to a crime, delict, or contravention, or that there is no charge against the accused, he declares by an order that there is no necessity to prosecute, and, if the accused has been arrested, sets him at liberty.—C. P. C., 128. In India the Police Officer can only release on bail.

Case to be sent to Magistrate when evidence is sufficient.

170. If, upon an investigation under this chapter, it appears to the officer in charge of the Police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial; or, if the offence is bailable, and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

When the officer in charge of a Police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant, if any, and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

If the Court of the District Magistrate or Subdivisional Magistrate be mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may

refer the case for inquiry or trial, provided reasonable notice of such reference be given to such complainant or persons.

The day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody.

The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

In France, if the *Juge d' Instruction* is of opinion that the act is a simple police contravention, he sends the accused before the tribunal of police; if it is a delict, he sends him before a correctional tribunal; if a crime, he sends the accused, together with all papers, exhibits, &c., before the Court of Appeal for regular trial.—C. P. C., 129—134.

Complainants and witnesses not to be required to accompany Police-officer.

Complainants and witnesses not to be subjected to restraint.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a Police-officer,

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond:

Recusant complainant or witness may be forwarded in custody.

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the Police-station may forward him under custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Diary of proceedings in investigation.

172. Every Police-officer making an investigation under this chapter *shall* day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

Any Criminal Court may send for the Police-diaries of a case under inquiry or trial in such Court, and may use such

diaries, not as evidence in the case but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court, but if they are used by the Police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police-officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.

Report of Police-officer.

173. Every investigation under this chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the Police-station shall forward to a Magistrate empowered to take cognizance of the offence on a police report a report in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused person has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties.

Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the Local Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

Police to inquire and report on suicide, &c.

174. Every officer in charge of a Police-station, on receiving information that a person—

(*a*) has committed suicide, or

(*b*) has been killed by another, or by an animal, or by machinery, or by an accident, or

(*c*) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless other-

wise directed by any rule prescribed by the Local Government, or by any general or special order of the District or Subdivisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

The report shall be signed by such Police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Subdivisional Magistrate.

When there is any doubt regarding the cause of death, or when for any other reason the Police-officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon or other medical officer appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

In the Presidencies of Fort St. George and Bombay, investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorized to hold inquests.

The following Magistrates are empowered to hold inquests, namely: any District Magistrate or Subdivisional Magistrate, and any Magistrate specially empowered in this behalf by the Local Government or the District Magistrate.

In England it has been held that the Coroner, though nowhere expressly ordered to hear witnesses on both sides, is clearly bound by the rules of justice to hear one side as well as another, seeing that his sole object is the truth.—(2 Hale P. C., 60; *Reg.* v. *Ingham*, 5 B. & S., 257.) As the inquiry is wide and indeterminate, and no individual is charged, and it may end in no accusation being made at all, there is good ground for holding that the Court is not an open Court, and that the Coroner has a discretion as to admitting persons not interested or not closely connected with the inquiry. Cases may occur in which privacy may be requisite for the sake of decency; others in which it may be due to the family of the deceased; and

the propriety of the Coroner's decision on this subject cannot be questioned.—*Garnet* v. *Ferrand*, 6 B. & C., 611.

Time is sometimes wasted in making an investigation where none is necessary. It will be seen that the section leaves a discretion to the District or Subdivisional Magistrate, who may dispense with the formal local investigation in any particular case or class of cases.

The Police have the right to do all acts necessary to enable them to get at the body; as incidental to this right they (under the direction of the station-officer) might break open doors to get at the body. The Coroner, or any person holding his warrant, has a similar right in England. A medical man holding a Coroner's warrant, has a right to break open doors, if necessary, to get at the body.—(6 & 7 Wm. IV., c. 89.)

Section 540 of the Code gives Courts full power to call what witnesses they please during inquiries and trials; but there are no special rules (except ss. 509, 510) for obtaining the aid of experts, and compelling them to give their assistance. In Germany, an expert whether he holds an official commission to act, or publicly exercises his science, art, or profession, is bound to give his advice. The expert is informed of the contents of the record and of the depositions of witnesses, and he is even allowed to put questions to the witnesses or the accused. The expert is entitled to his expenses and fitting remuneration. If his evidence is not satisfactory, the Court may appoint another expert.—Germ. C. P. C., 75, 80, 83, 84.

A corpse must be always examined with the assistance of a surgeon. In India there is apparently no legal obligation on doctors (except the Government surgeon of a civil station) to assist at the examination of corpses, and consequently there are often failures of justice. Nor is there any prohibition against an immediate burial or burning of the body. In Germany the *post-mortem* is made in the presence of a judicial officer by two doctors, one being a doctor attached to the Court. The other must not be the doctor who has attended the deceased during his last illness, but he may be present at the operation, in order to give information regarding the course of the disease. The corpse must be identified by witnesses who knew deceased, and accused must be confronted with it to make him recognize it.—Germ. P. C., 87, 88.

In England it is a misdemeanour to burn or otherwise dispose of a dead body, with intent thereby to prevent the holding upon such body of a Coroner's inquest, and so to obstruct a Coroner in the execution of his duty. A Coroner has jurisdiction to hold, and is justified in holding an inquest, if he honestly believes information which has been given him to be true, which, if true, would make it his duty to hold such inquest.—13 Q. B. D., 331.

Power to summon persons.

175. An officer in charge of a Police-station may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than ques-

tions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture.

If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the Police-officer to attend a Magistrate's Court.

In England the admissibility of depositions taken by Coroners on the trial of accused persons depends not on any statutory provision, but on the common law rules relating to proof of evidence given on a former occasion.—Steph. Dig. Ev., 32.

Inquiry by Magistrate into cause of death.

176. When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in section 174, clauses (*a*), (*b*) and (*c*), any Magistrate so empowered may, hold an inquiry into the cause of death, either instead of, or in addition to, the investigation held by the Police-officer; and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed, according to the circumstances of the case.

Power to disinter corpse.

Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

Deaths from violence are sometimes concealed by hasty cremations. Probably it will be found necessary in India, as in other countries, to insist on information being given to the Police or some other public officer before bodies can be burnt or buried. This is required in France: see section 358 of French Penal Code. Under section 359, *Id.*, those who conceal or hide the corpse of a person who has been murdered or who has died from violence, are punishable with from six months to two years' imprisonment, independently of any punishment to which they are liable for participation in the crime.—See also Belgian Penal Code, s. 315. See notes under s. 45, *supra*.

In England a Coroner may make an order for the disinterment of a body in order to holding an inquest thereon within a reasonable time after the death of the said body.—2 Hawk. P. C., 80; Jervis, 36.

Except in cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of

burial without the license of one of Her Majesty's principal Secretaries of State—20 & 21 Vict., c. 81, s. 25. This section enables the Secretary of State to order exhumation in any case where such course appears desirable or necessary. A Coroner may also direct the disinterment of a body.—Jervis, 418, 3rd Ed.

PART VI.

PROCEEDINGS IN PROSECUTIONS.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

A.—Place of Inquiry or Trial.

Ordinary place of inquiry and trial.

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

See section 531.

In England, the question whether an offence committed afloat can be said to have been committed in the nearest country is illustrated by the case of *R.* v. *Cunningham*, 8 Cox, C. C., 104. In that case the offence was committed on board an American ship in the Penarth Roads, Bristol Channel, three quarters of a mile from the coast of Glamorganshire, at a spot never left dry by the tide, and lying between Glamorganshire and the Flat Holms (an island commonly treated as part of the country of Glamorgan), the ship being at the time two miles from the island on the inside, about ten miles from the opposite shore of Somersetshire, and ninety miles from the Roads to the mouth of the Channel: *Held*, that the part of the sea, where the vessel was, formed part of the county of Glamorgan, and that the venue "Glamorgan" in the indictment was right. Until the decision of the Judges in the case of *R.* v. *Keyn* (L. R., 2 Ex. D., 63) it was commonly supposed that the jurisdiction of the English Crown extended for three miles beyond low water mark, or as far as a cannon shot would formerly have reached (*quousque tormenta exploduntur* or *ubi finitur armorum vis*). In that case, however, it was decided that no such jurisdiction affected foreigners on board foreign ships. To meet the necessity created by that decision, the Territorial Waters Jurisdiction Bill (41 & 42 Vict., c. 73) was passed in 1878, by which (s. 2) an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a

foreign ship, and the person who commits such offence may be arrested, tried and punished accordingly. The jurisdiction of the Admiral includes the jurisdiction of any Judge, Magistrate, &c., having power, &c. "The territorial waters of Her Majesty's dominions" means such part of the sea as is deemed by international law to be within the territorial sovereignty of Her Majesty. By s. 3 of the same Act no trial is to be instituted in the case of a person who is not a subject of Her Majesty without the consent of one of Her Majesty's principal Secretaries of State.

Where a person accused of having committed in one part of Her Majesty's dominions any offence, however described, punishable in the part of Her Majesty's dominions in which it is committed by imprisonment with hard labour or with labour or rigorous imprisonment for twelve months or upwards, has left that part, such person, if found in another part of Her Majesty's dominions, is liable to be apprehended and returned to the part from which he is a fugitive, whether the offence of which he is accused is or is not an offence in the part of Her Majesty's dominions where he is apprehended. All territories and places within Her Majesty's dominions which are under one legislature are one British possession and one part of Her Majesty's dominions.—44 & 45 Vict., c. 69, ss. 1, 9, 39. In a British possession, the warrant is to be endorsed by the Governor of such possession. This includes a Lieutenant-Governor, but *quære*—does it include a Chief Commissioner? A fugitive, when apprehended, must be brought before a Magistrate, who (subject to the provisions of the Fugitive Offenders Act, 1881,) must hear the case as near as possible in the same manner as if the fugitive were charged with an offence committed within his jurisdiction. If the evidence raises a strong or probable presumption that the offence was committed, the fugitive is to be returned after fifteen days to that part of Her Majesty's dominions from which he is a fugitive.—Steph. Dig., C. P. C., 165—167.

In Germany offences may be tried either in the district where committed or where accused is domiciled at the time of the accusation. Under the German common law it might also be tried wherever accused was arrested, and this system of three alternative places has been followed in France, C. P. C., 23, 63: also in Prussia, Law of the 3rd May, 1852, Article 2. When the offence is committed on a German ship, in a foreign port or at open sea, it may be tried by the Court of the place whence the ship always starts (Heimathshafen) or at the first German port which the ship comes to after the commission of the offence.—Germ. C. P. C., 7, 8, 10.

Power to order cases to be tried in different Sessions Divisions.

178. Notwithstanding anything contained in section 177, the Local Government may direct that any cases or class of cases committed for trial in any district may be tried in any Sessions Division:

Provided that such direction be not repugnant to any direction previously issued under the twenty-fourth and twenty-fifth of Victoria, chapter 104, section 15, or under this Code, section 526.

Accused triable in district where act is done, or where consequence ensues.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Illustrations.

(*a.*) A is wounded within the local limits of the jurisdiction of Court X. and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried either by X or Z.

(*b.*) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days, within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(*c.*) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

In England, the offence of bigamy may be tried in any county or place where the offender is apprehended or is in custody.—24 & 25 Vict., c. 100, s. 57. The same rule applies to forgery, post-office and revenue offences.

Place of trial where act is offence by reason of relation to other offence.

180. When an act is an offence by reason of its relation to any other act which is also an offence, or which would be an offence if the doer were capable of committing an offence, a charge of the first mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Illustrations.

(*a.*) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(*b.*) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(*c.*) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place.

Being a thug or belonging to a gang of dacoits, escape from custody, &c.

181. The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

Criminal misappropriation and criminal breach of trust.

The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received by the accused person, or the offence was committed.

Stealing.

The offence of stealing anything may be inquired into or tried by a Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who receives or retains the same, knowing or having reason to believe it to be stolen.

Under New York Laws, 1877, ch. 167, an indictment for receiving stolen goods from a train may be found and tried in any county through which the train passed on the trip during which the goods were stolen.

Place of inquiry or trial where scene of offence is uncertain,

or not in one district only,

or where offence is continuing,

or consists of several acts.

182. When it is uncertain in which of several local areas an offence was committed, or

where an offence is committed partly in one local area and partly in another, or

where an offence is a continuing one, and continues to be committed in more local areas than one, or

where it consists of several acts done in different local areas,

it may be enquired into or tried by a Court having jurisdiction over any of such local areas.

In New York the jurisdiction in cases of kidnapping, decoying away children, abduction, &c., is in any county in which the offence is committed, or into or out of which the person, upon whom the offence was committed, may, in the commission of the offence, have been brought, or in which any act of abetment has taken place.

Section 46 of the English Summary Jurisdiction Act of 1879 is as follows :—

(1) Where the offence is committed in any harbour, river, arm of the sea, &c., which forms the boundary of the jurisdiction of two or more Courts of summary jurisdiction, such offence may be tried by any one of such Courts.

(2) Where the offence is committed on the boundary of two jurisdictions, or within 500 yards of such boundary, or is begun in one jurisdiction, and completed in another, it may be tried in either.

(3) Where the offence is committed on any person or in respect of any property in any carriage, cart, &c., employed in a journey or on board any vessel employed in a navigable river, lake, &c., the person accused may be tried by any Court of summary jurisdiction *through whose jurisdiction* such carriage, &c., passed in the course of the journey or voyage.

If the place where offence has been committed be unknown, the Judge of the place where defendant is arrested is preferred to the place in which the defendant lives. If the offence is commenced in one place and completed in another, the Judge of the latter place has cognizance.—Ital. C. P. C., 16, 17.

Offence committed on a journey.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed passed in the course of that journey or voyage.

Offences against Railway, Telegraph, Post-office and Arms Acts.

184. All offences against the provisions of any law for the time being in force relating to Railways, Telegraphs, the Post-office or Arms and Ammunition may be inquired into or tried in a Presidency-town, whether the offence is stated to have been committed within such town or not: Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

High Court to decide, in case of doubt, district where inquiry or trial shall take place.

185. Whenever any doubt arises as to the Court by which any offence should, under the preceding provisions of this chapter, be inquired into or tried, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be inquired into or tried.

In British Burma, when the offender is an European British subject, the Recorder of Rangoon, and in all other

cases the Judicial Commissioner, shall, for the purposes of this section, be deemed to be the High Court.

Power to issue summons or warrant for offence committed beyond local jurisdiction.

186. When a Presidency Magistrate, a District Magistrate, a Subdivisional Magistrate or, if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), or any other law for the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits, and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

Magistrate's procedure on arrest.

When there are more Magistrates than one having such jurisdiction, and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent, or bound to appear, the case shall be reported for the orders of the High Court.

By 18 & 19 Vict., c. 91, s. 21, "If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour, or if any person not being a British subject charged with having committed any crime or offence on the high seas, is found within the jurisdiction of any Court of Justice in Her Majesty's dominions which would have had cognizance of such crime or offence, if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits." So that if one British seaman, says Stephen, stabs another in Marseilles harbour, or if an American on a British ship stabs a fellow-passenger on the high seas, either can be tried under the Indian Penal Code by the High Court of Calcutta, if the ship goes to India, or under the common law and the 24 and 25 Vic., c. 100, in any competent court in England, if the ship goes to England. Cr. L., ii, 23. I think Sir James Stephen has overlooked the proviso to the section cited by him. The prisoner might be tried according to the Indian Criminal Procedure Code, but the punishment would have to be determined by English law. See notes under ss. 2, 3, Penal Code.

Procedure where warrant issued by Subordinate Magistrate.

187. If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the Police-officer executing such warrant, or shall be sent to the Magistrate by whom such warrant was issued.

If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

GENERAL SECRETARIAT LIBRARY.

Liability of British subjects for offences committed out of British India.

188. When an European British subject commits an offence in the dominions of a Prince or State in India in alliance with Her Majesty, or when a Native Indian subject of Her Majesty commits an offence at any place beyond the limits of British India, he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found.

Political Agent to certify fitness of inquiry into charge.

Provided that no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there be one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India.

Provided also that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India, shall be a bar to further proceedings against him under the Foreign Jurisdiction and Extradition Act, 1879, in respect of the same offence in any territory beyond the limits of British India.

By the Merchant Shipping Act (17 & 18 Vict., c. 104, s. 267) offences committed out of Her Majesty's dominions by any master, seaman or apprentice, who is, or within three months previously has been, employed in any British ship, shall be tried and disposed of as if they had been committed within the jurisdiction of the Admiralty.

In *R.* v. *Allen* (7 C. & P., 664) a ship had sailed from London on a China voyage, and three chests of tea were stolen from her when off Wampa. It was stated that Wampa was on a river, twenty or thirty miles from the sea, and no evidence was given as to the tide flowing there or not; this was held sufficient evidence that the ship was on the high seas to give the central Criminal Court jurisdiction.

A foreigner on board a British ship on the high seas owes allegiance to the law of England, and if he commits an offence against that law, he is triable, under the statute, 18 & 19 Vict., c. 91, s. 21, by any Court of Justice in Her Majesty's dominions within whose jurisdiction he may happen to be, provided that such Court would have had cognizance of the crime if committed within the limits of its ordinary jurisdiction.

A fugitive criminal is any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State, who is in or is suspected of being in some part of Her Majesty's dominions. No fugitive criminal may be surrendered to a foreign State, if the offence be one of a political character, or the requisition has in fact been made with a view to try or punish him for an offence of a political character. 33 & 34 Vict., c. 52, ss. 3, 25, 26. A Secretary of State may order the apprehension of a fugitive criminal. The Police Magistrate at Bow Street must receive any evidence showing that the offence is of a political character, or not an extradition crime. If such evidence is produced as (subject to the provisions of the Extradition Acts, 1870 and 1873) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the Magistrate must commit him to prison to await the warrant of a Secretary of State for his surrender. *Ibid.*, ss. 9, 10. Depositions taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction may, if duly authenticated, be received in evidence in proceedings under the Extradition Acts. *Ibid.*, s. 14.

Power to direct copies of depositions and exhibits to be received in evidence.

189. Whenever any such offence as is referred to in section 188 is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

See s. 503, *infra*, and s. 33, Indian Evidence Act.

'Political Agent' defined.

190. In sections 188 and 189, the expression 'Political Agent' means and includes—

(*a*) the principal officer representing the British Indian Government in any territory beyond the limits of British India:

(*b*) any officer in British India appointed by the Governor-General in Council, or the Governor in Council of the Presidency of Fort St. George or Bombay, to exercise all or any of the powers of a Political Agent under the Foreign Jurisdiction and Extradition Act, 1879, for any territory not forming part of British India.

B.—Conditions requisite for Initiation of Proceedings.

Cognizance of offences by Magistrates.

191. Except as hereinafter provided, any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

(*a*) upon receiving a complaint of facts which constitute such offence;

(*b*) upon a police report of such facts;

(*c*) upon information received from any person other than a Police-officer, or upon his own knowledge or suspicion that such offence has been committed.

The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance under clause (*a*) or clause (*b*) of offences for which he may try or commit for trial.

The Local Government may empower any Magistrate of the first or second class to take cognizance under clause (*c*) of offences for which he may try or commit for trial.

When a Magistrate takes cognizance of an offence under clause (*c*), the accused, or, when there are several persons accused, any one of them, shall be entitled to require that the case shall, instead of being tried by such Magistrate, be either transferred to another Magistrate or committed to the Court of Session.

The Indian law prescribes no limitation for the cognizance of offences. In Germany the limitation is 20 years in the case of offences punishable with death or perpetual reclusion; 15 years in the case of crimes punishable with a maximum of more than ten years' imprisonment; 10 years in the case of crimes punishable with imprisonment of a less duration. As regards delicts, there can be no prosecution after the lapse of five years, if such delicts are punishable with a maximum of more than three months' imprisonment, or after the lapse of three years in the case of all other delicts. The prescription

runs from the day the act was committed, and is interrupted by every proceeding of the Judge directed against the author of the criminal act.—G. P. C., 67, 68. See notes under s. 203.

In New York, there is no limitation of time, within which a prosecution for murder must be commenced. Indictments for public offences must be found, in some cases within two, and in other cases within three, years after the commission of the offence.—N. Y. C. P. C., 140—144.

In Scotland, there is a prescription of twenty years, unless the criminal has absconded, &c.—2 Hume, 136.

In Louisiana prosecutions for all misdemeanours, except public offences, are prescribed by the lapse of three years after the commission of the offence. If the indictment is for a crime, and the party is found guilty of a misdemeanour, the prescription does not apply. Prosecutions for injuries to reputation, for rape, assault with intent to ravish, assault aggravated by injury to pudicity are prescribed by one year. Bk. ii. Tit. vii, chap. 5 of the French Code d' Instruction Criminelle is devoted to the subject of prescription or limitation. All punishments are prescribed by the lapse of 20 years; but the convicted person is not allowed to reside in the department in which the injured party or his heirs reside; and the Government may assign him a place to live in. Punishments awarded by Correctional Courts are prescribed by the lapse of five years from the date on which the conviction became final. In the case of offences punishable with death, perpetual imprisonment, severe or degrading imprisonment, both the public action and the civil action are prescribed by the lapse of ten years, dating from the commission of the crime, if in that interval there has been no act of procedure or prosecution; or if there have been such acts, the prescription to count from the last of such acts. But in both the above cases, the prescription is reduced to three years, when the offence is a delict only punishable in a correctional manner. The prescription for punishments is two years only in the case of simple police contraventions and one year only for the institution of a prosecution (public or civil), to count from the date of occurrence, no matter whether steps for prosecution may have been taken in the meanwhile. The prescription for prosecutions for crimes is ten years, unless some *acte d'instruction* has been entered in the meanwhile; for delicts it is three years, and for simple contraventions one year. For certain delicts there are special periods of prescription, for instance, one month for rural delicts, such as allowing one's cattle to trespass on the land of another. Proceedings taken against any person, though not the real offender, interrupt the prescription.—Cass., 5th May 1865; so also proceedings taken before an incompetent Court.—Cass., 18th January 1822, *et al.* In the case of delicts, prescription runs from the date of commission, although the delict may not have come to light.—Cass., 10th January 1857. In the case of breach of trust (l'abus de confiance) the prescription counts from the date on which an account has been rendered, or the date on which the accused first showed an intention to keep the money entrusted to him. It is not a continuing delict so as to permit the prescription to count from the dates of spending the misappropriated money.—Cass., 2nd December 1865, 10th January 1868, 30th June 1864.

Except in the case of death, Justices in England have no authority to institute an inquiry for the purpose of detecting the offender. But

the Procurator-fiscal in Scotland has such power.—Pat. Eng. and Scotch Law, p. 323.

Prosecutions for the recovery of excise and customs penalties must be brought within six months after the commission of the offence.—11 & 12 Vict., c. 118. s. 3.

The 8th chapter of Part II of the Prussian Penal Code closes with a prescription not to be found in any other Code. Whoever, through negligence, makes a false oath, can be condemned to imprisonment for one year. This punishment is not pronounced, when the individual revokes formally his false testimony before he has been denounced or prosecuted, and before any injurious consequences have resulted from it. Beseler, in his Commentary on the Code, remarks on this section that perjury has the most dangerous and pernicious consequences for society and the interests of every citizen, and therefore that both must, so far as possible, be guaranteed, not only against criminal intentions, but also against culpable negligence.

Regarding limitation, Beccaria remarks: "Those atrocious crimes, whose memory tarries long in men's minds, deserve, when once proved, no prescription in favour of a criminal who has fled from his country; but lesser and obscurer crimes should be allowed a certain prescription which may remove a man's uncertainty concerning his fate, because the obscurity in which for a long time his crimes have been involved deducts from the bad example of his impunity, and the possibility of reform meantime remains to him." The maxim *nullum tempus occurrit regi* is gradually becoming more and more obsolete. Many recent statutes fix a limitation for prosecution. There should certainly be a limitation of about three months in all cases in which private sanction is necessary for the prosecution. This is the law in Germany, P. C., 61; Holland, P. C., 66; Hungary, P. C., 112.

As regards prescription of crimes in Scotland, the Court in one case dismissed the indictment, where the prosecution was thirty years after the offence, the accused having been all the time within the kingdom. Hume thinks that 20 years should be sufficient to bar prosecution, unless the delay was caused by the accused absconding, and even in that case the prosecution, in order to keep up his right to pursue, should demand sentence of fugitation. Hume II, 136; Alison II, 97. Many statutes limit the time, within which prosecution must be instituted under them, *e. g.*, under the Riot Act, twelve months. This is especially being done in modern statutes. See the Margarine Act and other Acts of 1887.

Transfer of cases by Magistrates.

192. Any District Magistrate or Subdivisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.

Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case, to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

193. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

Cognizance of offences by Courts of Session.

Additional Sessions Judges and Joint Sessions Judges shall try such cases only as the Local Government by general or special order directs them to try, or as the Sessions Judge of the Division makes over to them for trial.

Cases to be tried by Additional and Joint Sessions Judgs;

Assistant Sessions Judges shall try such cases only as the Sessions Judge of the Division by general or special order makes over to them for trial.

by Assistant Sessions Judges.

"Except as otherwise expressly provided"—See s. 477.

194. The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided.

Cognizance of offences by High Court.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the twenty-fourth and twenty fifth of Victoria, chapter 104.

195. No Court shall take cognizance—

(*a*) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, except with the previous sanction, or on the complaint, of the public servant concerned, or of some public servant to whom he is subordinate;

Prosecution for contempts of lawful authority of public servants.

(*b*) of any offence punishable under section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate;

Prosecution for certain offences against public justice.

(*c*) of any offence described in section 463, or punishable under section 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding, except with

Prosecution for certain offences relating to documents given in evidence.

the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate.

Nature of sanction necessary.

The sanction referred to in this section may be expressed in general terms, and need not name the accused person; but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed.

When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.

Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no such sanction shall remain in force for more than six months from the date on which it was given.

For the purposes of this section, every Court, other than a Court of Small Causes, shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie.

The Courts of Small Causes in the Presidency-towns shall be deemed to be subordinate to the High Court, and every other Court of Small Causes shall be deemed to be subordinate to the Court of Session for the Sessions Division within which such Court is situate.

The sanction given in this section leaves the private prosecutor to proceed or not as he chooses. If a Court wishes actually to institute a prosecution for an offence against public justice, it will proceed under s. 476.

In England, no bill of indictment for certain offences can, without the consent of the Court, be presented to or found by any Grand Jury, unless (1) the prosecution has been bound by recognizance to prosecute, or (2) the accused has been bound to appear, or (3) the indictment be preferred by a Judge of one of the superior Courts; or by the Attorney-General or Solicitor-General, or, in the case of an indictment for perjury, by the direction of any Court, Judge, or public functionary. The said offences are perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house, any indecent assault, libel, and any offence under the Newspaper Libel and Registration Act, 1881.

Prosecution for offences against the State

196. No Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code, except section 127, or punishable under section 294A of

the same Code, unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf.

Prosecution of Judges and public servants.

197. When any Judge, or any public servant not removable from his office without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognizance of such offence, except with the previous sanction of the Government having power to order his removal, or of some officer empowered in this behalf by such Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government.

Power of Government as to prosecution.

Such Government may determine the person by whom, and the manner in which, the prosecution of such Judge or public servant is to be conducted, and may specify the Court before which the trial is to be held.

See Chap. IX, Penal Code, and secs. 217—223. There is a special Act, XVIII of 1850, which protects a person acting judicially from liability for an Act done or ordered to be done by him in the discharge of his judicial duty within the limits of his jurisdiction. The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained in England. *Gwinne* v. *Poole*, 2 Lutw., 1560; *Floyd* v. *Barker*, 12 Rep., 23; *Hamond* v. *Howell*, 2 Mod., 218; *Cave* v. *Mountain*, 1 Scott, N. R., 132; *Metcalfe* v. *Hodgson*, Hutton, 120. In *Garnet* v. *Ferrand* the coroner who removed the plaintiff from the place of an inquest was held not liable in trespass, as the removal was ordered by him in a judicial capacity. 6 B. & C., 611. See also *Tozer* v. *Child*, 7 E. & B., 377. In *Calder* v. *Halket* the Magistrate having jurisdiction over Asiatics in Bengal, but not over Europeans, was held not liable in trespass for an apprehension of the plaintiff under a warrant issued by him, he not knowing the plaintiff to be European. 3 Moo. P. C. C., 28. The Privy Council say that trespass will not lie for a judicial act without jurisdiction, unless the Judge had the means of knowing the defect of jurisdiction: and it lies on the plaintiff in every case to prove that fact. In *Houlden* v. *Smith* the Judge of the County Court was held liable in trespass because he was within the exception thus laid down, and had the means of knowing that he had no jurisdiction. In *Taafe* v. *Lord Downes* the Judge was justified by the plea in trespass which shewed a warrant issued by him in his capacity of Judge, although the plea did not shew that the warrant

was lawful, but was purposely confined to the right of a Judge to protection. 3 Moo. P. C. C., 28, 36, n. Throughout these cases and many others, says Broom, the vital importance of securing independence for every judicial mind is earnestly recognised. In India no distinction is made between the Judges of superior and inferior Courts.

In England nearly all public officers of any importance have a special statutory protection afforded to them either by the same statute which confers upon them their power, or by some general enactment passed for their especial benefit. These protective enactments are all drawn upon one plan, and their leading characteristics are notice of action, limitation of action, tender of amends, payment into Court, confinement of evidence to statement in notice, and in some cases a special judgment where the facts go to shew probable cause for the act complained of.—Chaster, Powers of Executive Officers, 2nd Edn., 301.

Prosecution for breach of contract, defamation and offences against marriage.

198. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence.

In Italy a woman cannot be prosecuted for adultery except upon the complaint of the husband. A husband can only be prosecuted for keeping a concubine in the conjugal house on the complaint of the wife.—Ital. P. C., 482, 483. The law is the same in France and Belgium—See under s. 497, P. C.

Quære—In India, can a complaint of bigamy be withdrawn, bigamy not being a compoundable offence under s. 345? In Italy, in the case of all offences, in which the penal action cannot be exercised except at the instance of the person harmed, the latter can withdraw at any stage of the case, even during the hearing of the appeal.—Ital. C. P. C., 117. Under s. 487 of the Italian Penal Code, when husband or wife has been found guilty of concubinage or adultery, the one can prevent the condemnation of the other by withdrawing from the complaint, and can also make the effects of the condemnation cease, if he or she agrees to continue to live with the other. Condonation of one by the other applies of right to the accomplice.

The German Code has a curious provision in the case of insults. A private accusation of this offence cannot be instituted until an attempt at reconciliation has been made and failed. For this purpose some authority is appointed by the judicial administration. But this rule is not applicable to insults committed against public officers, ministers of religion, or members of the armed forces, in the exercise of their duties.—Germ. C. P. C., 420.

The cases in which there can be no prosecution, except on the complaint of the injured party, are more numerous in Germany. They are high treason against a Sovereign or foreign State (102—104, P. C.), violation of domicile (*id.*, 123), fraud in the matter of marriage, (170), adultery (172), seduction (179, 182), outrage on the memory of a deceased person (189), insult (194), voluntary hurt (232), abduction of

women (236, 237), theft and misappropriation committed to the prejudice of parents, &c. (247), cheating relations, guardians, &c. (263), misappropriation to the prejudice of creditors, usufructuaries, &c. (288, 289), hunting on the land of another (292), violation of another's secret (299—302), damage of another's property (303). See Germ. C. P. C., 151, 152. In these cases prosecutions must be instituted within three months.—*Id.* P. C., 61.

Prosecution for adultery or enticing a married woman.

199. No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman, or in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.

Neither under this nor the preceding section does the code specify any time within which complaint must be made. In Germany, in all cases in which private sanction is necessary, complaint must be made within three months from the time when the complainant came to know of the act *and its author*.—G. P. C., 61. The only limitation in the Indian Code is six months when sanction is given, under s. 195, *supra*, for the prosecution of offences against public justice.

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

Examination of complainant.

200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

Provided as follows—

(*a*) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192:

(*b*) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and need not be reduced to writing, but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing:

(*c*) when the case has been transferred under section 192, and the Magistrate so transferring it has already examined

the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

In England it is not necessary, except where required by statute that the information should be on oath; and even where this is required by statute, the omission is held to be cured by the defendants appearing to the summons.—*R.* v. *Millard*, 22 L. J., M. C., 108. See s. 537, *infra*.

The Indian Code does not specify who may present complaints on behalf of others; but see s. 191, which permits a Magistrate to act on information received from any person. In Italy, the husband can complain for the wife; the ascendant for minor descendant in his charge; the tutor and guardian in respect of matters connected with the guardianship.—Ital. C. P. C., 105.

Procedure by Magistrate not competent to take cognizance of the case.

201. If the complaint has been made in writing, and the Magistrate is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper tribunal with an endorsement to that effect.

Postponement of issue of process.

202. If the Chief Presidency Magistrate, or any other Presidency Magistrate whom the Local Government may from time to time authorize in this behalf, or any Magistrate of the first or second class, sees reason to distrust the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons for distrusting the truth of the complaint, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a Police-officer, or by such other person, not being a Magistrate or Police-officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

If such investigation is made by some person not being a Magistrate or a Police-officer, he shall exercise all the powers conferred by this Code on an officer in charge of a Police-station, except that he shall not have power to arrest without warrant.

This section applies to the police in the towns of Calcutta and Bombay.

Dismissal of complaint.

203. The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint if, after examining the complainant and considering the result of the investigation (if any) made under section 202, there is in his judgment no sufficient ground for proceeding.

See s. 437, *infra*.

Excessive delay in bringing a complaint may be a ground for dismissal, though there is no general law of prescription in criminal cases. *Nullum tempus occurrit regi.* Stephen mentions the case of Horne, who was executed for the murder of his bastard child, thirty-five years after the commission of the crime, and he adds as a curiosity that, at the Derby Winter Assizes in 1863, he held a brief for the Crown in a case in which a man was charged with having stolen a leaf from a Parish Register in the year 1803, but the grand jury threw out the bill. There are some statutory limitations in England, *e. g.*, three years for prosecutions for high treason, &c., twelve months for offences against the Riot Act, six months for offences punishable on summary conviction. Offences committed in India by official persons must, if prosecuted in England, be prosecuted within six years after the offence (33 Geo. III., c. 52, s. 140); or, if prosecuted before the special Parliamentary Court constituted by 24 Geo. III., c. 25, within three years after the offender leaves India. See notes under s. 191, *supra*.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

Issue of process.

204. If, in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or some other Magistrate having jurisdiction.

Nothing in this section shall be deemed to affect the provisions of section 90.

On the Continent the civil action and penal action can be brought simultaneously. The civil action can also be brought separately

before the Civil Judge: but if a penal action is pending, the civil action *must* be suspended until the penal action has been decided. Another very important provision—that the Legislature would do well to adopt in India—is that there can be no civil action when it has been declared by a final judgment, that there are no grounds for prosecuting, either because the act imputed does not constitute an offence, or because the accused has been acquitted as not having committed the act.—Ital. C. P. C., 4, 6. In those cases in which a criminal prosecution can only be instituted on the complaint of the injured party, the latter cannot institute such prosecution, if the civil action has been dismissed by a competent judge.—*Id.*, 7. See under s. 250, *infra*; also s. 545.

Magistrate may dispense with personal attendance of accused.

205. Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

But the Magistrate inquiring into or trying the case may, in his discretion at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

In Italy, persons charged with contraventions only may be represented by any person holding a special power; if charged with delicts, they must appear in person, unless the punishment for the delict be fine only, in which case they may appear by an advocate; if charged with a crime, they must in all cases appear in person.—Ital. C. P. C., 271.

Even on the day fixed for trial, the Magistrate may permit an accused person to appear by pleader. In England some convictions were upheld, which had been made by Justices upon no other appearance than that of an attorney, who professed to represent the parties charged, without requiring proof of the service of the summons, and upon the evidence offered in support of one of the charges only. *Ex parte Hopwood*, 19 L. J., M. C., 197.

In France, the accused may be represented by an advocate only if the delict be not punishable with imprisonment; but the Court may order him to attend at any time.—C. P. C., 185. Advocates can represent the accused without producing a special power.—Cass., 11th March 1848.

An accused can, on his demand, and by reason of the long distance of his house from the Court, be exempted from appearance at the trial, if the Court thinks that the case will be met by a punishment of fine, or confiscation, or not more than six weeks' imprisonment. In such case, the accused ought to be examined by Commission, and he may be represented at the trial by a defender, who must produce a power-of-attorney.—Germ. C. P. C., 232, 233. See under s. 252.

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

Power to commit for trial.

206. Any Presidency Magistrate, District Magistrate, Subdivisional Magistrate, Magistrate of the first class or any Magistrate empowered in this behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

But save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

In England the Attorney-General or Solicitor-General may, without sending an indictment before a Grand Jury, file a criminal information against any person accusing him of any misdemeanour. Informations are usually filed in cases of misdemeanours having a tendency to disturb the public peace or to interfere with good government, as, for instance, cases of seditious libel or other libels in which the public are interested, cases of official corruption or fraud or misconduct, cases of bribery.—Steph. Dig., C. P., 198.

Procedure in inquiries preparatory to commitment.

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

"Ought to be tried by such Court." In Italy, where a man has committed several offences, some cognizable by the Court of Assize and some by the Correctional Tribunal, the former Court has jurisdiction.—Ital. C. P. C., 19.

Taking of evidence produced.

208. The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution, or in behalf of the accused, or as may be called for by the Magistrate.

Process for production of further evidence.

If the complainant or officer conducting the prosecution, or the accused applies to the Magistrate to issue process to compel the attendance of any witness or the pro-

duction of any document or other thing, the Magistrate shall issue such process, unless, for reasons to be recorded, he deems it unnecessary to do so.

Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

In a preliminary inquiry it is now optional with the Magistrate to allow cross-examination of the witnesses. This is as it should be. It is not the intention of the legislature that the preliminary inquiry should be protracted into a regular trial. Of course, where facts are doubtful, the Magistrate is only too ready to permit questions to be put or suggested by the pleader for the defence. But there are frequently cases of such a nature that it would be waste of time to allow this, and in such cases it is the duty of the Magistrate to commit with all possible expedition. This is also the practice in England. In England, preliminary inquiries used to be nothing more nor less than what in India are denominated police or preliminary *investigations*. In 1824, John Thurtell was tried for murder. Stephen describes the preliminary inquiry: It appears that commitments often used to be made within a few days of the commission of the offence. "The prisoners were not brought into the room, it being thought best to keep them ignorant of the entire evidence against them, at least for a short time. Thurtell was then called in and *asked many questions* by Mr. Noel, the *solicitor for the prosecution*. Hunt (Thurtell's accomplice) was afterwards separately examined, which led to his making a full confession." The examinations taken before the Magistrates were published in the newspapers, and Mr. Justice J. A. Park made the following observations upon the subject in his charge to the Grand Jury:—"I understand these depositions have appeared in the public press. The first fault is with the Magistrates in allowing any persons to enter into their private apartments for the purpose of taking notes of their proceedings. There is a vast difference between the inquisitorial and the judicial power of the Magistrates. The statute law of the land has for 269 years required that inquiries and investigations should be conducted in a private manner. I appeal to the experience of every gentleman who hears me, and I know what my own experience as judge has taught me, whether the constant course is not to transmit the depositions to the Judge, taking care that the accused should not have an opportunity of seeing them. The prosecutor or his solicitor may have access to them, but not the party accused. For what will be the consequence if the latter has access to them? Why, that he will know everything which is to be produced in evidence against him, an advantage which it was never intended should be extended towards him."

"The first alteration made in this state of things," says Stephen, "was effected in 1836 by the Prisoners' Counsel Act (6 & 7, Will. IV., c. 114, s. 4), which provided thal all persons under trial should *at their trial* have a right to inspect all depositions taken against them. In 1849, by 11 & 12 Vict., c. 42, s. 27, it was provided that the accused should be entitled to a copy of the depositions. Probably the establishment of a regular police force may have put the Magistrates in a new position in fact before the change was

embodied in the statute law. As a regular force was established, first in the towns and then in the country, by which charges of crime were investigated, however imperfectly, the Magistrates would naturally assume a more and more judicial position. The inquiry before the Magistrates is now essentially judicial. *It may indeed admit of a doubt whether it is not too judicial, and whether it does not tend to become a separate trial.* This tendency was certainly encouraged by the power given by 30 & 31 Vict., c. 35, to the prisoner to call witnesses before the Magistrates, and to have them bound over to appear at the trial and to have their expenses allowed."—Steph. Cr. L., i., 229.

When accused person to be discharged.

209. When the evidence referred to in section 208, paragraphs 1 and 2, has been taken, and he has examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

In England, if a Justice refuses to commit for certain offences, and the prosecutor desires to prefer an indictment, the Justice must take the recognizance of the prosecutor to prosecute, and proceed in the same way as if he had committed the person charged to be tried for such offence. The offences in question are perjury, subornation of perjury, conspiracy, obtaining money or property by false pretences, keeping a gambling house, keeping a disorderly house, any indecent assault, libel, and any offence under the Newspaper Libel and Registration Act, 1881.—22 & 23 Vict., c. 17, s. 2.

When charge is to be framed.

210. When, upon such evidence being taken, and such examination (if any) being made, the Magistrate finds that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

Charge to be explained and copy furnished, to accused.

As soon as the charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

211. The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

List of witnesses for defence on trial.

The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Further list.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under section 211.

Power of Magistrate to examine such witnesses.

The object of this section is to prevent the concoction of false defences after commitment.

213. When the accused, on being required to give in a list under section 211 has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

Order of commitment.

214. If any person (not being an European British subject) is accused before a Magistrate other than a Presidency Magistrate of havig committed an offence conjointly with an European British subject who is about to be committed for trial, or to be tried, before the High Court on a similar charge arising out of the same transaction, and the Magistrate finds that there are sufficient grounds for committing the accused for trial, he shall commit him for trial before the High Court, and not before the Court of Session.

Person charged outside Presidency-towns jointly with European British subject.

Quashing commitments under section 213 or 214.

215. A commitment once made under section 213 or section 214 by a competent Magistrate can be quashed by the High Court only, and only on a point of law.

See s. 532, *infra*.

Summons to witnesses for defence when accused is committed.

216. When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list as have not appeared before himself, to appear before the Court to which the accused has been committed:

Provided that where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly:

Refusal to summon unnecessary witness unless deposit made.

Provided also that if the Magistrate think that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may, before summoning him, require such sum to be deposited as such Magistrate thinks necssary to defray the expense of obtaining the attendance of the witness.

Bond of complainants and witnesses.

217. Complainant and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary, and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court, to prosecute or to give evidence, as the case may be.

Detention in custody in case of refusal to attend or to execute bond.

If any complainant or witness refuses to attend before the Court of Session or High Court, or to execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court

is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

Quære—May witnesses be required to execute bonds with sureties? In New York they may be so required, if the Magistrate is satisfied, by proof on oath, that there is reason to believe that they will not otherwise appear and testify.—N. Y. C. P. C., 215.

Article 218 is as follows: "When, however, it satisfactorily appears that the witness is unable to procure sureties, he may be forthwith conditionally examined, on behalf of the people, and must thereupon be discharged." Article 219: "The last section does not apply to the prosecutor, or to an accomplice in the commission of the offence charged." In committing an old offender for a simple theft, I have once or twice had to detain for weeks a travelling pilgrim, who happened to be a witness. See s. 499, *infra*, which speaks of "any person." In Scotland, a witness who cannot give bail, may be kept in prison at the prosecutor's expense till the trial.—2 Hume, 375.

In India, the matter appears to be doubtful. S. 86, *supra*, refers only to accused persons. But in ss. 90, 91, the word "person" of course includes a witness. But this only proves that a witness, for whose arrest a warrant is issued, may be ordered to give sureties for appearance before the Court issuing the warrant. The question is whether, when the witness has appeared, he can be ordered to give sureties for his appearance on a subsequent day to which the case is adjourned. From s. 217 it would appear not, as that section speaks of "bonds" only. See the Forms in Schedule V correlative to the various sections. Compare Forms 2, 3 with Form 26. See also Form 42, which refers to persons charged with offences. There is no form distinctly correlative to s. 217.

Commitment when to be notified.

218. When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the Local Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

Charge, &c., to be forwarded to High Court or Court of Session.

and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

English translation to be forwarded to High Court.

When the commitment is made to the High Court, and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

Power to summon supplementary witnesses.

219. The Magistrate may summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

Such examination shall, if possible, be taken in the presence of the accused, and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall, if the accused so require, be given to him free of cost.

See s. 548, *infra*. In France, an accused sent for trial before the Court of Assize is entitled to have, free of cost, one copy of the procès-verbaux establishing the offence and of the written statements of the witnesses. His counsel may take copies of other parts of the record at their own expense. The Court of Cassation has ruled that the accused is not entitled to a copy of the procès-verbaux establishing, not the imputed offence, but merely the guilt of the accused.—Cass., 25th June 1819, 29th June 1865.

In England, a witness cannot be objected to by the prisoner on the ground that no notice was given before the trial that such witness would be called. In Scotland, notice must have been given. 9 Geo. IV., c. 29, s. 11. Pat. Eng. and Scotch Law, p. 333.

Custody of accused pending trial.

220. Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused, by warrant, to custody.

CHAPTER XIX.

OF THE CHARGE.

Form of Charges.

Charge to state offence.

221. Every charge under this Code shall state the offence with which the accused is charged.

Specific name of offence sufficient description.

If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge.

The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Language of charge.

In the Presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Previous conviction when to be set out.

If the accused has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date, and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed.

Illustrations.

(*a.*) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it.

(*b.*) A is charged under section 326 of the Indian Penal Code with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(*c.*) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion or adultery or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(*d.*) A is charged under section 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

In Scotland a repute that an accused is a common thief, that is, gets his livelihood or supplements it by thieving, is an aggravation of theft.—Hume i, 92; Alison i, 296. See s. 75, P. C.

Particulars as to time, place, and person.

222. The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against

whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

When manner of committing offence must be stated.

223. When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Illustrations.

(*a.*) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(*b.*) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(*c.*) A is accused of giving false evidence at a given time and place, The charge must set out that portion of the evidence given by A, which is alleged to be false.

(*d.*) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(*e.*) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(*f.*) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

"When words are the gist of an offence, they must be specified in the indictment."—Steph. Dig., C. P. C., 249. For instance, the words should be set out in a charge under s. 294 of the Penal Code.

Words in charge taken in senses of law under which offence is punishable.

224. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Effect of errors.

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission.

Illustrations.

(*a.*) A is charged under section 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit,"

the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(*b.*) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(*c.*) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in this case, a material error.

(*d.*) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(*e.*) A was charged with murdering Haidar Baksh on the 20th January 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

See ss. 535, 537.

Procedure on commitment without charge or with imperfect charge.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Court may alter charge.

227. Any Court may alter any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

Every such alteration shall be read and explained to the accused.

When trial may proceed immediately after alteration.

228. If the charge framed or alteration made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may in its dis-

cretion, after such charge or alteration has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

When new trial may be directed, or trial suspended.

229. If the new or altered charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

Stay of proceedings if prosecution of offence in altered charge require previous sanction.

230. If the offence stated in the new or altered charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Recall of witnesses when charge altered.

231. Whenever a charge is altered by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or resummon, and examine, with reference to such alteration, any witness who may have been examined.

Effect of material error.

232. If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence under section 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge: but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Joinder of Charges.

Separate charges for distinct offences.

233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236, and 249.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and the causing grievous hurt.

An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two different occasions, one in the progress of a trial, the other in an affidavit in Chancery. Both acts of perjury had the same object in view: *Held*, that though the offences were in this way distinct, they might both be included in the same indictment, and that a general finding of guilty on the charges contained in both counts was good.—*Castro* v. *Reg.*, 6 App. Cas., 229.

Three offences of same kind within year may be charged together.

234. When a person is accused of more offences than one of the same kind, committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code, or of any special or local law.

24 & 25 Vict., c. 96, s. 71, enacts that, in an indictment for any embezzlement or for fraudulent application or disposition, it is lawful to charge the offender with any number of distinct acts of embezzlement or fraudulent application or disposition, not exceeding three, committed against Her Majesty or against the same master or employer within the space of six months from the first to the last of such acts.

I.—Trial for more than one offence.

235. I.—If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

II.—Offence falling within two definitions.

II.—If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined

or punished, the person accused of them may be charged with and tried at one trial for each of such offences.

III.—Acts constituting one offence, but constituting when combined a different offence.

III.—If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined, or for any offence constituted by any one or more of such acts.

Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustrations.

to paragraph I—

(*a.*) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and tried for, offences under sections 225 and 333 of the Indian Penal Code.

(*b.*) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code

(*c.*) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Cole.

(*d.*) A has in his possession several seals knowing them to be counterfeit, and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code. A may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code.

(*e.*) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accuses B of having committed an offence knowing that there is no just or lawful ground for such charge. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code.

(*f.*) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(*g.*) A, with six others, commits the offences of rioting, grievous hurt, and assaulting a public servant endeavouring, in the discharge of his duty as such, to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325, and 152 of Indian Penal Code.

(*h.*) A threatens B, C, and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (*a*) to (*h*) respectively may be tried at the same time.
to paragraph II—

(*i.*) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under sections 353 and 328 of the Indian Penal Code.

(*j.*) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code.

(*k.*) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code.

(*l.*) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code. A may be separately charged with, and convicted of, offences under sections 471 (read with 466) and 196 of the same Code.
to paragraph III—

(*m.*) A commits robbery on B, and, in doing so, voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code.

"One series of acts so connected together as to form the same transaction." In France, offences are said to be connected, not only when they are committed at the same time by several persons in unison, but when they are committed by different persons, even at different times and places, but in pursuance of a former concert, or when the offenders have committed certain offences to procure the means of committing others, to facilitate them, to complete their perpetration, or to escape detection.—Fr. C. P. C., 227. Under this section the Court of Cassation has ruled that the acts should be connected together by a relation of cause and effect.—Cass., 16th July 1874.

Where it is doubtful what offence has been committed.

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Illustration.

A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

A person may be convicted of giving false evidence on an alternative charge. See s. 554 and Form 28 in Sched. V. See 13 B. L. R., 324 and I. L. R., 10 Calc., 937; also 4 Mad. H. C., 51; 1 Mad. H. C., 38; I. L. R., 7 All., 44; 8 W. R., Cr., 79.

When a person is charged with one offence, he can be convicted of another.

237. If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence, which he is shown to have committed, although he was not charged with it.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust, or of receiving stolen goods (as the case may be), though he was not charged with such offence.

When offence proved included in offence charged.

238. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitues a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.

When a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

Illustrations.

(*a.*) A is charged under section 407 of the Penal Code with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 406.

(*b.*) A is charged under section 325 of the Penal Code with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of that Code.

What persons may be charged jointly.

239. When more persons than one are accused of the same offence, or of different offences committed in the same transaction, or when one person is accused of committing any offence, and another of abetment of, or attempt to commit, such offence, they may be charged and tried together or separately, as

the Court thinks fit; and the provisions contained in the former part of this chapter shall apply to all such charges.

Illustrations.

(*a.*) A and B are accused of the same murder. A and B may be charged and tried together for the murder.

(*b.*) A and B are accused of a robbery, in the course of which A commits a murder with which B has nothing to do. A and B may be tried together on a charge, charging both of them with the robbery, and A alone with the murder.

(*c.*) A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge, charging both with the one theft, and B alone with the two other thefts.

On an indictment of three persons jointly for publishing blasphemous libels in certain numbers of a newspaper, two of them, whose names were on it as Editor and Publisher, having already been convicted on a charge of publishing similar libels in another number of the paper: *Held*, that the third, whose case was that he was not connected with the paper at all, had a right to be, on his application, tried separately, as his trial with the others might possibly prejudice him in his defence, especially as he desired to call them as witnesses, while it did not appear that his separate trial could at all embarrass the case for the prosecution, as the prosecutor would be entitled to give any evidence in his power to fix the defendant with a joint liability for the acts of the others.—*Reg.* v. *Bradlaugh*, 15 Cox, C. C., 217.

Held, in Canada, that two persons accused of the same offence, but in two separate indictments, are competent as witnesses in favour of the Crown, and against one another, or the one for the other—*Reg.* v. *Tellier*, 1 R. I., 565.

Held, in Penang, that two or more prisoners may be charged jointly for fabricating false evidence, or filing a false account, or making a false claim, or using evidence known to be false. Kyshe, S. S. Rep., iii, 115. In India persons may be tried jointly for giving false evidence, but the charges against each must be separate—7 W. R., Cr., 50; 9 W. R., Cr., 66; 7 B. L. R., A. Cr., 66.

Withdrawal of remaining charges on conviction on one of several charges.

240. When more charges than one are made against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

See s. 494, *infra*.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

Procedure in summons-cases.

241. The following procedure shall be observed by Magistrates in the trial of summons-cases.

In France, the lowest Courts are the tribunals of simple police, which deal with simple police contraventions punishable with 15 francs fine or 5 days' imprisonment. Twenty-hours must intervene between service of citation and hearing. Before the day of hearing the *juge de paix* can estimate the damage and perform other acts requiring expedition. It is worthy of note that if the person summoned does not appear, he is judged by default. He may appear in person or by special agent. Judgment is to be pronounced at the same hearing or on the following day. Contraventions are proved by the procès-verbaux or witnesses or both. Neither party can bring evidence to disprove the contents of the procès-verbaux, except with the permission of the Court. Near relatives of the accused are not admissible as witnesses, but if no objection has been raised, their examination does not vitiate the proceedings. The Court can only acquit if it finds that the contravention is not proved. If it convicts, it must inflict some punishment.—Cass., 27th Feb. 1806, *et passim.* Judgment must be signed within 24 hours after delivery.—Fr. C. P. C., 145—164.

Substance of accusation to be stated.

242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

In England, in summary proceedings before Justices, if the defendant has been duly served with the summons, and fails to appear, the Justices are entitled to hear the case in his absence, and to adjudicate therein in the same way, as if he had appeared.—11 and 12 Vict., c. 43, s. 2. See notes under s. 353, *infra.* Some such provision is necessary in India for petty cases.

Conviction on admission of truth of accusation.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and if he shows no sufficient cause why he should not be convicted, the Magistrate shall convict him accordingly.

Procedure when no such admission is made.

244. If the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.

The Magistrate may before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Acquittal.

245. If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

Sentence.

If he finds the accused guilty, he shall pass sentence upon him according to law.

In France, where the civil party appears in criminal cases, the Court may order the accused to pay compensation, even though acquitted, if such order is otherwise consistent with the absence of criminal guilt.—Cass., 23rd Feb. 1865; 7th Nov. 1864.

Finding not limited by complaint or summons.

246. A Magistrate may, under section 243 or section 245, convict the accused of any offence triable under this chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

Non-appearance of complainant.

247. If the summons has been issued on complaint and upon the day appointed for the appearance of the accused or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day.

Withdrawal of complaint.

248. If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

Power to stop proceedings when no complainant.

249. In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or, with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

Frivolous or vexatious complaints.

250. If in any case instituted upon complaint, a Magistrate acquits the accused under section 245 or section 247, and is of opinion that the complaint was frivolous or vexatious, he may, in his discretion, by his order of acquittal, direct the complainant to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit.

Recovery of compensation.

The sum so awarded shall be recoverable as if it were a fine: Provided that, if it cannot be realized, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs.

At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

In India there appears to be nothing to prevent a person from going first to a Civil Court and then to a Criminal, or *vice versâ*. A complainant in a case of assault, who has been made to pay compensation to the accused under this section, may apparently go to a Civil Court and institute a suit for the very same assault. This appears very anomalous, and such double jurisdiction is very pernicious. The Criminal Court might find that the accused had not exceeded his right of private defence, and the Civil Court might find he had done so, or *vice versâ*. The rule in France, as laid down by the Court of Cassation, appears to be an excellent one: "The acquittal pronounced in a Criminal Court is only an obstacle to a civil action if

the Criminal Judge has clearly negatived the fact which is the common basis of either action and the civil claim is absolutely irreconcilable with the findings and decision of the Criminal Judge.—Cass., 20th April 1863. As regards the procedure in Italy, see notes under s. 204.

In England, if Justices dismiss a case of assault or battery on the merits (finding offence not proved, or assault justified, or so trifling as not to merit any punishment), they have to make out a certificate of such dismissal, and give it to the party accused. The certificate or the conviction (in case of conviction) shall be a bar to any other proceedings, civil or criminal, for the same cause. (24 and 25 Vict., c. 100, s. 45.) In a reported case (*Masper and wife* v. *Brown*, Law Rep., 1 C. P. Div. 97) defendant assaulted the female plaintiff and was fined: *Held*, that an action in respect of the consequential damage to the husband by reason of the assault was barred by this section. In *Queen* v. *Morris* (Law Rep., 1 C. C. R., 90), a conviction for assault by Justices in petty sessions was held not to be a bar to an indictment for man-slaughter of the person assaulted. This, of course, is obvious. The man-slaughter is not "the same cause" as the assault.—See s. 403, ill. (c), *infra*.

The power of giving compensation to accused persons ought to be extended to warrant cases as well. See s. 552, which applies to Presidency-towns only. In Germany, when any proceedings, even of an extra-judicial nature (*i. e.*, a police inquiry, or the preparatory procedure directed by the public minister prior to the introduction of the public accusation) have been taken on a false or a grossly careless charge, the Court which tries the case (or to which the case would have come for trial), may direct the accuser to pay any costs incurred by Government or the person charged.—Germ. C. P. C., 501. Similarly when any charge, which requires private sanction, is withdrawn.—*Id.*, 502.

CHAPTER XXI.

OF THE TRIAL OF WARRANT CASES BY MAGISTRATES.

Procedure in warrant-cases.

251. The following procedure shall be observed by Magistrates in the trial of warrant-cases.

In France, the civil tribunals of first instance, are also vested, under the title of correctional tribunals, with power to try all delicts punishable with more than five days' imprisonment and fifteen francs fine. They are composed of three Judges; and the *Juge d' Instruction* may sit as one, *even though he has prepared the case*.—Cass., 30th Oct. 1812, C. P. C., 179, 180. Three days at least must elapse between the summons and the judgment. If the accused does not appear, he is judged by default; but such condemnation is withdrawn, if he appears within five days after the intimation to him of the judgment by default. If the Court finds the act to be a crime, it sends the accused to the competent *Juge d' Instruction* with a view to his being tried by the Court of Assize. If it convicts, it pronounces sentences and also awards civil damages.—*Ib.*, 184, seqq.

Evidence for prosecution.

252. When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.

The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

"When the accused appears." In Italy, if an accused legally cited does not appear, he is judged by default, and the judgment is communicated to him with the least possible delay. The accused is allowed ten days to apply to have the case re-opened, but he has to pay the costs. If he does not apply, the sentence is executed.—Ital. C. P. C., 347, 388, 390. See notes under s. 353, *infra*.

"When the accused appears." It is a keenly debated question among criminalists whether the judgment by default or contumacy should be allowed. French, Belgian, and Italian legislators have answered the question in the affirmative; but the German Code follows the Austrian Code, and does not generally permit it. There are, however, some exceptions. A tria can take place in the absence of the accused, when he is prosecuted for desertion from military service, or when the offence is punishable with fine only, with simple imprisonment not exceeding six weeks, or with confiscation; but the accused must be warned in the summons that the trial can take place in his absence.—Germ. C. P. C., 231. Again, if the accused has appeared and been examined, and afterwards absconds, the trial can be concluded in his absence, if the Court does not consider his presence necessary, no matter what the offence may be.—*Id.*, 230. See under s. 205.

In Germany the following persons can refuse to give evidence: the *fiancé* or *fiancée*, the wife or husband (even after dissolution of marriage) and those connected with accused in a direct line by blood, marriage, or adoption, those related by blood in a collateral line, up to the third degree, or by marriage, up to the second degree. If there are several accused persons, and a witness is related as above to any one of them, he can refuse his testimony against the others, if by testifying he might implicate the accused against whom he is not bound to testify.—Germ. C. P. C., 51; Aust. C. P. C., 152. The following persons also *may* refuse their testimony: priests, *quoad* communications made to them in their spiritual capacity; defenders and advocates of the accused and doctors, *quoad* communications made to them as such.—Germ. C. P. C., 52. The benefit of this section does not extend to notaries, apothecaries, or midwives. Doctors and counsel cannot reveal such communications, unless permitted by those who confided in them. As regards priests, the Austrian law goes farther than the German, and forbids the Courts to receive their testimony regarding facts revealed to them in confession or under the seal of professional secrecy.—Aust. C. P. C., 151 (1).

Discharge of accused.

253. If upon taking all the evidence referred to in section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

"If he finds that no case against the accused has been made out, which, if unrebutted, would warrant his conviction." In Italy, when in a criminal case pleas of civil right are put forward concerning property and other real rights, the existence of which would negative the criminality of the act, the Judge, *if he finds some ground* for such pleas, *may* suspend the trial, and send the case to a competent Judge to decide on the merits of the said pleas, at the same time fixing a certain period for the accused to obtain such a decision.—Ital. C. P. C., 33.

Charge to be framed when offence appears proved.

254. If, when such evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.

Plea.

255. The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.

Can an accused withdraw a plea of guilty deliberately made? For instance, an accused may plead guilty, the Magistrate may put off the case till next day for judgment, and meanwhile the friends of the accused may engage a pleader, who advises him (accused) to plead not guilty. It was ruled in Mississippi that a prisoner cannot be allowed to withdraw his plea of guilty on the ground that it was made in the belief that he would receive a similar punishment to one previously administered him for a similar offence, but had since heard that it would be more severe.—60 Miss., 86.

The confession of a prisoner before a Magistrate is a sufficient ground to warrant a conviction, although there is no positive proof *aliunde* that the offence was committed.—*Rex* v. *White*, R. & R. C. C., 508.

Defence.

256. If the accused refuses to plead or does not plead, or claims to be tried, he shall be called upon to enter upon his defence and to produce his evidence, and shall, at any time while he is making his defence, be allowed to recall and cross-examine any witness for the prosecution present in the Court or its precincts.

If the accused puts in any written statement, the Magistrate shall file it with the record.

Held, in Pennsylvania, that, after defendant's evidence upon a criminal trial was nearly closed, the state might introduce testimony in rebuttal.—13 Phila. (Pa.), 442.

Held, in South Carolina, that upon an indictment against three persons, containing two counts, first for riot, and second for rescue, that the Judge might require one counsel to conduct the cross-examination for all the defendants alone.—16 S. C., 486.

In trials before a Magistrate a pleader has no absolute right to make a speech or to argue the case; but he has this right in sessions trials. The law specifically enacts (s. 290, *infra*) that, in sessions trials, the pleader for the defence may open his case, comment on the evidence, and sum up his case.—Section 340 merely gives all accused the right *to be defended*. No Magistrate would prevent a pleader from briefly summing up his case, but Magistrates should prevent any abuse of the privilege, such as irrelevant arguments and useless repetitions. It was held to be no error in Nebraska, where a Judge restricted the time for arguments in an important criminal case of murder to three hours, and there was no evidence that further time was needed.—*Hart* v. *State*, 14 Neb., 572.

As to cross-examination, Stephen remarks: "Cross-examination is no doubt an absolutely indispensable instrument for the discovery of truth, but it is the part of the whole system which is most liable to abuse, and which, in my opinion, ought to be kept most carefully and jealously under control by the Judge" . . . . "Whilst the power of cross-examining to a witness's credit is essential to the administration of justice, it is of the highest importance that both Judges and counsel should bear in mind the abuse to which it is liable, and should do their best not to ask, or permit to be asked, questions conveying reproaches on character, except in cases in which there is a reasonable ground to believe that they are necessary . . . . . Cross-examination is not unfrequently converted into an occasion for the display of wit, and for obliquely insulting witnesses. It is not uncommon to put a question in a form which is in itself an insult, or to preface a question or receive an answer with an insulting observation. This naturally provokes retorts, and cross-examination so conducted ceases to fulfil its legitimate purpose. . . . When such a scene takes place, the Judge is the person principally to blame. He has a right on all occasions to exercise the power of reproving observations which are not questions at all, of preventing questions from being put in an improper form, and of stopping examinations which are not necessary for any legitimate purpose." Stephen's remarks apply with tenfold force to India, where the abuse of cross-examination is a scandal on

the administration of justice. Some subordinate Courts do their best to uphold and enforce the law (Evidence Act, ss. 148—153), but they are not properly supported by the superior Courts.

"Refuses to plead or does not plead." So in England, a prisoner declining to plead to an indictment, the Court directed a plea of not guilty to be entered.—*R.* v. *Barnard*, 1 F. & F., 240.

Process for compelling production of evidence at instance of accused.

257. If the accused applies to the Magistrate to issue any process for compelling the attendance of any witness (whether he has or has not been previously examined in the case) for the purposes of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice. Such ground shall be recorded by him in writing.

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

In Italy, when the Court considers the list of witnesses, either for prosecution or defence, to be too long, it must order the list to be reduced to a reasonable figure; and, if the order is not carried out, shall itself reduce the list to such a number as it considers sufficient. —Ital. C. P. C., 385.

This section is often abused. Magistrates frequently grant applications for summoning a large number of witnesses, although they are convinced in their own minds that the evidence will not be relevant, or that the applications are made merely for the purpose of vexation or delay, or for defeating the ends of justice. Magistrates are not altogether to blame for not exercising their better judgment, as the provisions of s. 537, C. P. C., and the general spirit of Indian Criminal Procedure are sometimes disregarded by some Appellate and Revisional Courts.

In Germany, if the Court refuses to summon a witness, the accused can himself cite him to appear. The citation is served through one of the officers of the Court, but the accused must deposit the expenses for the journey of the witness and his loss of time, in accordance with a fixed tariff. If the witness actually throws any light on the case, the Court may order his expenses to be borne by the State.—Germ. C. P. C., 219.

Acquittal.

258. If in any case under this chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Conviction.

If in any such case the Magistrate finds the accused guilty, he shall pass sentence upon him according to law.

It would be a good thing if a Magistrate or Judge in India were empowered to discharge an accused and to bind him over to come up for judgment, if and when called upon. This can be done in England and France.—See Fr. C. P. C., chap. viii, De la liberté provisoire et cautionnement.

In Canada, where a person is charged with a criminal offence, and receives a certificate of acquittal, such certificate will operate as a bar to any civil process for the same matter.—17 L. C. R., 268.

In Italy, an accused who has been acquitted can demand that the accusation inscribed against him be erased from the criminal registers, and the Court decides whether such demand should be allowed or disallowed.—Ital. C. P. C., 604.

In Austria if, in the opinion of the Court, no legal proof of the guilt is established, but nevertheless all the grounds of suspicion are not entirely destroyed, the judgment is pronounced with the declaration that the accused is set free on account of the insufficiency of the evidence.—C. P. C., 287. This is like the Scotch verdict "not proven."

Absence of complainant.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent and the offence may be lawfully compounded, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

CHAPTER XXII.

OF SUMMARY TRIALS.

Power to try summarily.

260. Notwithstanding anything contained in this Code,

(1) the District Magistrate,

(2) any Magistrate of the first class specially empowered in this behalf by the Local Government, and

(3) any Bench of Magistrates invested with the powers of a Magistrate of the first class and specially empowered in this behalf by the Local Government, may try in a summary way all or any of the following offences :—

(*a*) Offences not punishable with death, transportation or imprisonment for a term exceeding six months ;

(*b*) Offences relating to weights and measures, under sections 264, 265, and 266 of the Indian Penal Code ;

(*c*) Hurt, under section 323 of the same Code;

(*d*) Theft, under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees;

(*e*) Receiving or retaining stolen property, under section 411 of the same Code, where the value of such property does not exceed fifty rupees;

(*f*) Assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees;

(*g*) Mischief, under section 427 of the same Code;

(*h*) House-trespass, under section 448 of the same Code;

(*i*) Insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506 of the same Code;

(*j*) Abetment of any of the foregoing offences;

(*k*) An attempt to commit any of the foregoing offences, when such attempt is an offence:

Provided that no case in which a District Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

Summary jurisdiction has been considerably curtailed by the present Code. Herein, as in many other points, very erroneous ideas are prevalent. In England, the tendency is more and more to extend the summary jurisdiction of Magistrates. It is cheap, speedy, and effective, and saves litigants expense. Quite apart from offences, Justices have jurisdiction in many other matters. By 2 and 3 Vict., c. 71, a Magistrate may—

(1) deliver to owner goods stolen, fraudulently obtained, unlawfully pawned, &c.;
(2) settle certain disputes about wages;
(3) order compensation for wilful damage done by tenants;
(4) deal summarily with cases of oppressive distress;
(5) order delivery to owner of goods unlawfully detained;
(6) order cleansing of house in filthy and unwholesome condition;
(7) punish common informer for compounding offences, by which they were not personally aggrieved.

The second paragraph of s. 262, *infra*, prevents a Magistrate from trying summarily many cases of theft and receiving stolen property. The fact that a case may be brought under a section not triable summarily does not prevent the Magistrate from trying it summarily, if it falls under one or more of the heads specified. For instance, the police in India are very fond of sending up petty cases under s. 147 of the Penal Code. Magistrates may try such cases summarily under ss. 379, 447, 323 or other appropriate sections of the Penal Code. If it be held that a Magistrate cannot try such cases summarily, then as a logical sequence it must follow that every case in which five or more persons cut and carry away a crop and use force in

doing so must be committed to the sessions as a dacoity (ss. 390, 391, 395, P. C.). This is a *reductio ad absurdum*. Every theft in a house (s. 380) would also fall under s. 451.

In Germany the Civil Courts of first instance can, by a written penal order (Strafbefehl), pronounce a condemnation without any regular trial, on the written requisition of the public minister. Such condemnation can only be pronounced for contraventions on delicts punishable with not more than three months' imprisonment or a fine of 600 marks; and the punishment pronounced must not exceed a fine of 150 marks or deprivation of liberty for more than six weeks, and confiscation (when allowed). A penal ordinance cannot subject an accused to police supervision. The public minister must state exactly the penalty which he demands and, if there be no reason to the contrary, the Court will pronounce it. If the Judge thinks he cannot make the order without a preliminary discussion, or if he thinks some other punishment should be pronounced, the matter is discussed. The penal ordinance must indicate the offence, the elements constituting it, the circumstances under which it was committed, and the section of the penal law. The defendant must be informed that, if he makes no opposition within a week, the order will become final. He may, before the week expires, state that he does not intend to make any opposition. If he makes opposition, the trial takes place before the tribunal of assessors, that is, the lowest grade of Criminal Courts, who, in their judgment, are not bound by the penal ordinance. If the accused does not appear, judgment goes by default.—Germ. C. P. C., Bk. VI, s. 1.

Power to invest Bench of Magistrates invested with less power.

261. The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences:—

(*a*) Offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, and 447;

(*b*) Offences against Municipal Acts, and the conservancy-clauses of Police Acts, punishable only with fine, or with imprisonment for a term not exceeding one month;

(*c*) Abetment of any of the foregoing offences;

(*d*) An attempt to commit any of the foregoing offences when such attempt is an offence.

Procedure for summons and warrant-cases applicable.

262. In trials under this chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this chapter.

Limit of imprisonment.

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Local Government may direct the following particulars:—

Record in cases where there is no appeal.

(*a*) the serial number;
(*b*) the date of the commission of the offence;
(*c*) the date of the report or complaint;
(*d*) the name of the complainant (if any);
(*e*) the name, parentage, and residence of the accused;
(*f*) the offence complained of and the offence (if any) proved, and in cases coming under clause (*d*), clause (*e*) or clause (*f*) of section 260, the value of the property in respect of which the offence has been committed;
(*g*) the plea of the accused and his examination (if any);
(*h*) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;
(*i*) the sentence or other final order; and
(*j*) the date on which the proceedings terminated.

264. In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

Record in appealable cases.

Such judgment shall be the only record in cases coming within this section.

265. Records made under section 263 and judgments recorded under section 264 shall be written by the presiding officer, either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue.

Language of record and judgment.

The Local Government may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an

Bench may be authorized to employ clerk.

officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A.—Preliminary.

'High Court' defined.

266. In this chapter, except in sections 276 and 307, the expression 'High Court' means a High Court of Judicature established or to be established under the twenty-fourth and twenty-fifth of Victoria, chapter 104, and includes the Chief Court of the Punjab, and such other Courts as the Governor-General in Council may, by notification in the *Gazette of India*, declare to be High Courts for the purposes of this chapter.

Trials before High Court to be by jury.

267. All trials under this chapter before a High Court shall be by jury;

and, notwithstanding anything herein contained in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the twenty-fourth and twenty-fifth of Victoria, chapter 104, the trial may, if the High Court so directs, be by jury.

Trials before Court of Session to be by jury or with assessors.

268. All trials before a Court of Session shall be either by jury or with the aid of assessors.

In Germany, Assizes are held before a jury of twelve and three Judges of the District Tribunal.—C. O. J., 79—81.

By the ordinance of the month of April 1852, the provisions of the Spanish Penal Code concerning political crimes, and the competency of the Courts for the trial of press offences, were altered. The jury is abolished for all kinds of political offences. In exceptional cases a jury decides in affairs of the press, but it is a newly-organized jury, which is composed of the notables, and those paying the greatest taxes.—Sanford, 122.

There was no Jury under the Austrian Code of Criminal Procedure: but I am not sure whether one has not since been established for certain offences.

Local Government may order trials before Court of Session to be by jury.

269. The Local Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may revoke or alter such order.

When the accused is charged at the same trial with several offences, of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session with the aid of the jurors as assessors, for such of them as are not triable by jury.

In Bengal trial by jury is in force in seven out of 46 districts.

In Germany the following cases are not tried by juries, but by the Criminal Chambers of District Tribunals: (1) crimes punishable with less than five years of reclusion: (2) crimes committed by a minor of 18 years: (3) the crime of outrage on morals under Penal Code, 176: (4) theft under P. C., 243, 244 · (5) harbouring, &c., under P. C., 260, 261: (6) cheating under P. C., 264. See German *Code d'organisation judiciaire*, Article 73, cl. 2—7.

Trial before Court of Session to be conducted by Public Prosecutor.

270. In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.

See ss. 492—495, *infra*.

B.—Commencement of Proceedings.

Commencement of trial.

271. When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Plea of guilty.

If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

Prisoners on trial may be manacled in the discretion of the Court, 10 Lea (Tenn.), 673.

A prisoner charged with felony at the Assizes must be made to stand in the dock.—*R.* v. *St. George*, 9 C. & P., 483. A merchant was indicted for slave-trading. The Court would not allow him to sit by his counsel, though the latter made the application on the ground that he was a foreigner, and several of the documents in the case were in a foreign language.—*R.* v. *Zulueta*, 1 C. & K., 215. A captain in the army was tried for feloniously shooting at another

in a duel: *Held*, that he must stand in the dock, but the Court allowed him to have three friends to stand besi le him there.—*R.* v. *Douglas*, Car. & M., 193. But a defendant, on a charge of misdemeanour, need not stand at the bar to be tried, but may be allowed a place at the table of the Court.—*R.* v. *Lovett*, 9 C. & P., 462.

See s. 255, *supra*. In England, if the statement of the accused amount to a confession or admission of guilt, and has not been obtained by threats or inducement, it may satisfy the jury without any corroborative proof, though the Judge generally directs the jury that some corroboration is required. In Scotland, some corroboration is considered indispensable, and the Judge so directs the jury.—2 Hume, 324.

Refusal to plead or claim to be tried.

272. If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case:

Trial by same jury or assessors of several offenders in succession.

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

Entry on unsustainable charge.

273. In trials before the High Court, when it appears to the High Court at any time before the commencement of the trial of the person charged, that any charge, or any portion thereof, is clearly unsustainable, the Judge may make on the charge an entry to that effect.

Effect of entry.

Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

Such entry has not the effect of an acquittal. See expln. to s. 403.

This section gives the High Court the same power that a grand jury have. "It is by no means uncommon," says Stephen, "for offenders to be committed in cases in which the Judge sees, though the committing Magistrate did not, that a link in the evidence is wanting, or that the evidence itself is of such a nature that the petty jury would be sure to acquit. In such cases it is usual to advise the grand jury to throw out the bill, and in this way open failures of justice are often prevented. This is specially common in the case of crimes of a disgusting nature imperfectly proved, the open trial of which is in itself an evil, and by no means a small one."

C.—Choosing a Jury.

Number of jury.

274. In trials before the High Court, the jury shall consist of nine persons.

In trials by jury before the Court of Session, the jury shall consist of such uneven number, not being less than three or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct.

In Italy, the jury consists of 14 persons. The jury can put questions with the consent of the President of the Court. A majority prevails. If the numbers are equal, the accused gets the benefit.—Ital. C. P. C., 492, 505.

Jury for trial of persons not Europeans or Americans before Court of Session.

275. In a trial by jury before the Court of Session of a person not being an European or an American, a majority of the jury shall, if he so desires, consist of persons who are neither Europeans nor Americans.

Jurors to be chosen by lot

276. The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct:

Proviso.

Provided that—

Existing practice maintained.

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed;

Persons not summoned when eligible.

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present; and

Trials before special jurors.

thirdly, in the Presidency-towns—

(*a*) if the accused person is charged with having committed an offence punishable with death, or

(*b*) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed.

A verdict will not be set aside for irregularity in drawing, summoning, returning, or impanelling jurors, unless injury results or unless the objection is taken before verdict.—1 Idaho N. S., 698.

The judgment in a criminal case will be reversed where the requirements of the statute concerning the drawing of jurors were departed from *against the objection of the defendant.—Bach* v. *State*, 38 Ohio St., 664.

Names of jurors to be called.

277. As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Objection to jurors.

Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated:

Objection without grounds stated.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

Challenges are of two kinds, (1) for cause, and (2) peremptory. It will be seen that in India peremptory challenges are allowed only in the High Court. Challenges for cause in England are either (1) to the array; (2) to the polls, when particular individuals are objected to. The challenge to the array is an objection to the whole body of jurors returned by the sheriff, not on account of their individual defects, but for some partiality or default in the sheriff or his under-officer, who arrayed the pannel. As to peremptory challenges, a defendant may peremptorily challenge to the number of twenty in all felonies, and to the number of thirty-five in treason (except that which consists in compassing the Queen's death). Arbitrary challenge is not allowed in misdemeanours. Stephen points out the absurdity of allowing a man, charged with a petty theft, to peremptorily challenge twenty jurors, while a man accused of perjury may see his bitterest enemy in the jury-box, but cannot get rid of him without giving judicial proof of his enmity. The Crown may order any number of persons called as jurors to stand by.—*Gray* v. *Reg.*, 11 C. & F., 427.

Grounds of objection.

278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed:—

(*a*) some presumed or actual partiality in the juror;

(*b*) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years;

(*c*) his having by habit or religious vows relinquished all care of worldly affairs;

(*d*) his holding any office in or under the Court;

(*e*) his executing any duties of police or being entrusted with police-duties;

(*f*) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury;

(*g*) his inability to understand the language in which the evidence is given, or, when such evidence is interpreted, the language in which it is interpreted;

(*h*) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

"Alienage." The Naturalization Act, 1870 (33 Vict., c. 14, s. 2), provides that real and personal property may be held by aliens, and a title acquired thereto through aliens. But it is specially provided that an alien shall not thereby be qualified for any office, or for any parliamentary, municipal, or other franchise, or to be the owner of a British ship.—*Id.*, s. 2, subs. 1; s. 14.

In England alienage is a ground of challenge to a juror—*R.* v. *Sutton*, 8 B. & C., 417. *Quære*—is the subject of a protected Native State in India an alien?

On the trial of a misdemeanour on the Crown side of the Assizes, it is a fair mode of practice to allow the defendants to object to the jurors, as they are called, without shewing any cause, till the pannel is exhausted, and then to call them again in the same order, and then not to allow any challenge except for cause; and this is the constant practice on the Welsh circuit, where challenges of jurors very frequently occur.—*R.* v. *Blakeman*, 3 C. & K., 97.

In Germany the following persons are incapable of being jurors:—(1) those who have lost the capacity in consequence of a criminal conviction; (2) those who are accused in any case, in which loss of civic rights or public functions may be prescribed as a punishment; (3) those who have been deprived by a judicial decision of the power of disposing of their goods; (4) foreigners.—C. O. J., 32, 84.

Decision of objection.

279. Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

Supply of place of juror against whom objection allowed.

If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276; or, if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury, provided that no objection to such juror or other person is taken under section 278, and allowed.

Foreman of jury.

280. When the jurors have been chosen, they shall appoint one of their number to be foreman.

The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

Swearing of jurors.

281. When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

In India the form of oath is prescribed by High Courts. In Germany the President of the Court puts the oath as follows: "You swear before God, the omnipotent and omniscient, to fulfil faithfully the duties of jurors, as regards the charges against N. N., and to vote conscientiously and according to your heart-felt conviction." Each juror separately takes the oath and replies: "I swear it, so help me God!"

Procedure when juror ceases to attend, &c.

282. If, in the course of a trial by jury, at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself, and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given, or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

In each of such cases the trial shall commence anew.

In France, if the trial is likely to be long, one or two supplementary jurors are chosen, who sit as jurors, but do not deliberate or give their verdicts unless any of the twelve are incapacitated by illness or otherwise. This appears to be a very good rule.—See Fr. C. P. C, 394.

In England, in the case of the illness of a juryman, it is not uncommon to swear a new juryman, giving the prisoner his challenges over again, and to read over the Judge's notes of the evidence given, swearing the witnesses afresh, and asking them if the evidence so recorded is true, the prisoner having power to cross-examine further. The circumstances may be such that this is unobjectionable, but where the first jury is discharged, because it is unable to agree; a second trial so conducted was disapproved of, though it was not set aside as a mistrial.—*Reg.* v. *Bertrand*, L. R., 1 P. C., 520; Steph Dig., C. P. C., 301.

In England, in civil cases, by consent of parties, the original trial may go on either with the reduced number, or with a fresh juror substituted for the one who cannot attend.

Discharge of jury in case of sickness of prisoner.

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar

D.—Choosing Assessors.

Assessors how chosen.

284. When the trial is to be held with the aid of assessors, two or more shall be chosen, as the Judge thinks fit, from the persons summoned to act as such.

Procedure when assessor is unable to attend.

285. If, in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of fresh assessors.

E.—Trial to close of cases for Prosecution and Defence.

Opening case for prosecution.

286. When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

In France, the prosecutor is not bound to call all the witnesses who have been examined in the preliminary inquiry.—Cass., 6th June 1810; 30th August 1866.

In France, the President of the *Cour d' Assises* is bound to interrogate the accused secretly within twenty-four hours after the arrival at the office of the papers and exhibits.—Hélie, *Prat. Crim.* I, 344. See s. 342, *infra.*

In France, the accused can put questions to the witnesses only through the President of the Court. The President may put such questions to the witnesses and to the accused as he deems necessary to clear up any points and to manifest the truth. The civil party can only put questions, to witnesses or accused, through the President.—C. P. C., 319.

Examination of witnesses.

The prosecutor shall then examine his witnesses.

Examination of accused before Magistrate to be evidence.

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

In Scotland, it must be proved at the trial that the prisoner was in his senses, when he made the declaration, and that it was freely

given and not extorted. Hence the Magistrate and another witness are usually called to prove it.—2 Hume, 327. In England, if signed by the Magistrate, it is admissible without further proof.

"The examination of the accused *shall* be read as evidence." The same is the rule in England, where the committing justice addresses the accused in some such words as follow: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you on your trial; you have nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to you, but whatever you now say may be given in evidence against you on your trial, notwithstanding such promise or threat."—11 & 12 Vict., c. 42, s. 18.

A prisoner was charged in England under 48 and 49 Vict., c. 69, s. 5, with having had unlawful intercourse with a girl under the age of fourteen. When before the justices, he gave evidence on oath: *Held*, that, at his trial, his statement, as made on oath, might be put in without his consent, and might be used for or against him.—*R.* v. *Adams*, 50 J. P., 136.

Evidence given at preliminary inquiry admissible.

288. The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case.

In France, the President of the Court of Assize is bound to make a note of any additions, alterations, or discrepancies between the evidence of a witness and his previous statements.—C. P. C., 318.

Procedure after examination of witnesses for prosecution.

289. When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

If he says that he does not, the prosecutor may sum up his case; and if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the Prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Corut shall call on the accused to enter on his defence.

Section 342, *infra*, applies to all inquiries and trials, and Judges should examine accused persons as therein directed. It is to be feared that this duty is sometimes overlooked in spite of the plain direction of the Legislature—"And the Court *shall*, for the purpose aforesaid, *question the accused generally* on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence."—S. 342, C. P. C. "It is unquestionably the fact," says Stephen, "that the interrogation of the accused by the President in France is not only the first, but is also the most prominent, conspicuous, and important part of the whole trial."—Cr. L., i, 545. It is not necessary to imitate the searching vigour of the French examination, but a series of relevant and carefully prepared questions is of the utmost importance as enabling an innocent man to "explain circumstances appearing against him," and, if the accused is guilty, as *rendering his conviction more probable.* This is sound sterling common sense.

In Canada, after the counsel for the prosecution has closed his case, and objection has been taken to some defect in the evidence, the Judge may recall witnesses, and make further inquiries to meet the objection, allowing at the same time, the counsel for the defence to cross-examine on such new evidence.—20 L. C. J., 291. The jury have a right, at the conclusion of a case, to recall any of the witnesses whose evidence was not wholly understood by them.—8. L. C. J., 281.

The production of fresh evidence on behalf of the prosecution (not known or forthcoming at the preliminary investigation, and not, previously to the trial, communicated to the other side) may be a ground for a postponement of the trial, if it appears necessary to justice.—*Reg.* v. *Flannagan*, 15 Cox, C. C., 403.

A son was tried for murdering his father. The State introduced evidence tending to show unfriendly relations between father and son. The father's widow testified that on the contrary their relations were friendly: *Held*, that the State might show, in rebuttal, that the widow, before her husband's death, in speaking of a difficulty between father and son, had said, that if the son had had a pistol he would have shot his father, and that he was then prepared for him.—73 Mo., 347.

A Judge may in his discretion allow the prosecution to put in additional evidence, after the case for the prosecution has closed.—16 South Carolina, 375. See under s. 256, *supra*. Where defendant proves new facts, prosecution may rebut them.—48 Mich., 498. Tex. Criminal Code, Art. 661, provides that if it appears that it is necessary to the due administration of justice, the Court *shall*, upon a trial, allow testimony to be introduced at any time before the conclusion of the arguments.—*Donahoe* v. *State*, 12 Tex., App. 297. This is merely the equivalent of s. 540, *infra*.

Defence.

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case.

Right of accused as to examination and summoning of witnesses.

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

In India the Sessions Court may summon and examine any witness whose evidence it considers essential, though such witness has not been examined by the committing Magistrate. See s. 540, *infra*. In France, the names of the witnesses must be notified by the Procureur-Général or civil party to the accused and *vice versâ* at least 24 hours before the hearing. If this is not done, either party may object to a witness, and the Court has to decide at once on such objection.—C. P. C., 315.

In France the following persons are not admissible as witnesses: —(1) the father, mother, &c. of accused; (2) his son, daughter &c.; (3) brothers and sisters; (4) those related by marriage in the same degree; (5) husband and wife even after divorce; (6) informers whose information is pecuniarily rewarded by the law. But the examination of the above persons does not vitiate the proceedings, if the Procureur-Général, or the civil party, or the accused have not objected.—C. P. C., 322. The Court of Cassation has ruled that the civil party cannot be heard as a witness.—Cass., 6th November 1834, *et al.* Nor are injured parties, who have complained, to be considered as informers. —Cass., 9th February 1816; 2nd April 1863, *et al.*

Prosecutor's right of reply.

292. If the accused, or any of the accused, has stated, when asked under section 289, that he means to adduce evidence, the prosecutor shall be entitled to reply.

At trials in France the accused has the last word.—C. P. C., 335; so in Germany, C. P. C., 257.

In New York the defendant has in every case the right to close the argument to the jury.—N. Y. C. P. C., 441.

The counsel for the prosecution has the right to reply, even if the evidence is evidence to character only. But in such cases the right is never, or hardly ever, exercised. The Attorney-General, or the Solicitor-General, appearing for the crown in his official capacity, has

the right of reply, whether the prisoner gives evidence or not. It has been doubted whether this right extends to counsel instructed to appear as the representative of the Attorney-General by any department of Government.—Steph. Dig., C. P., 291.

A statement of fact not intended to be proved gives a reply to the counsel for the prosecution.—*It.* v. *Butcher*, 2 M. & Rob., 228.

View by jury or assessors.

293. Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

Held, in Penang, that it is irregular for a juryman to visit the *locus in quo* of his own motion, and there to take observations with the view of testing the evidence of certain witnesses, and then to communicate the result of his observations to his fellow-jurors; but such irregularity will not vitiate the trial, unless it occasions a failure of justice. —Kyshe, S. S. Rep., iii, 110.

When juror or assessor may be examined.

294. If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

Jury or assessors to attend at adjourned sitting.

295. If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Locking-up jury.

296. The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day, and, subject to such rules, the presiding Judge may order whether and in what manner

the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

F.—Conclusion of Trial in Cases tried by Jury.

Charge to jury.

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

In Italy, the President of the Court of Assize has a discretionary power to do whatever he deems useful for the discovery of truth; and for such object the law leaves the choice of means to his honour and his conscience. He can interrogate any person he pleases and call for any new document which appears likely to throw some light on a contested fact.—Ital. C. P. C., 478, 479.

"The Judge," says Stephen, "ought not to conceal his opinion from the jury, nor do I see how it is possible for him to do so if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other must of necessity point to a conclusion. The act of stating for the jury the questions which they have to answer, and of stating the evidence bearing on those questions and showing in what respects it is important generally goes a considerable way towards suggesting an answer to them, and if a Judge does not do as much at least as this, he does almost nothing."—Cr. L., i., 455.

On the question of reasonable doubt, the Court instructed the jury that they should be so convinced by the evidence, that, as prudent men, they would "feel safe to act" upon such conviction in matters of the highest concern to their own dearest and most important interests, under circumstances where there was no compulsion or coercion on them to act at all: *Held*, not erroneous.—*Garfield* v. *State*, 74 Ind., 60: *Held*, in California, that it is error to instruct the jury that an unsuccessful attempt to prove an *alibi* is always a circumstance of great weight against the prisoner.—57 Cal., 628.

At trials in France, the President is not allowed to sum up. He merely reminds the jury of the duties they have to fulfil, and puts to them certain questions regarding the guilt of the accused.—C. P. C. 336. A separate question must be put on each distinct charge. If the accused alleges some fact which constitues a legal excuse or justification, the President must put the following question: "Is such fact true?" If the accused is under sixteen, he must put the question: "Has the accused acted with maturity of understanding?" (avec discernement.) The President also warns the jury that if a majority of them find extenuating circumstances, they must state such fact.—C. P. C., 336--341.

Duty of Judge.

298. In such cases, it is the duty of the Judge—

(*a*) to decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial;

(*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(*d*) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

The Judge may, if he thinks proper, in the course of his summing up, express to the jury this opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(*a.*) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(*b.*) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Held, in Kentucky, that in cases of house-breaking, whether the place of ingress was a part of the house charged to have been broken into, is a question for the Court, not for the jury.—79 Ky., 560.

Duty of jury.

299. It is the duty of the jury—

(*a*) to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned:

(*b*) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;

(*c*) to decide all questions which, according to law, are to be deemed questions of fact;

(*d*) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(*a.*) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(*b.*) The question is, whether a person entertained a reasonable belief on a particular point,—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

On an indictment for secretly disposing of the dead body of a bastard child, with intent to conceal its birth, it is a question of law for the Judge whether there has been a secret disposal: it is for the jury to say whether there has been a disposal with the necessary intent.—*R* v. *Clarke*, 4 F. & F., 1040.

What facts amount to such threats or promises as to exclude confessions as not being voluntary is a question of law. But whether the evidence proves the facts is a question of fact.—87 N. C., 572.

Ruled by the Court of Cassation in France that it belongs to the jury to decide on the existence of facts constituting legal excuses.—Cass., 22nd July 1847; 13th January 1853. But the Court must decide on the age of an accused, who alleges he is under 16 years. —Cass., 16th September 1836. But there are other rulings *contra.*

Retirement to consider.

300. In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

Held, in Penang, that the Court is not bound to receive the verdict of the jury, although unanimous, before the prisoner has closed his defence.—Kyshe, S. S. Rep., iii, 108.

Delivery of verdict.

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

In Italy, the jurors write 'yes' or 'no' on slips of paper and hand to the foreman. These slips are afterwards burnt. The foreman is he whose name has first been extracted from the urn, unless, with his consent, the jurors appoint some other.—Ital. C. P. C., 501, 503.

It is an established principle in English law that the verdicts of juries are not precedents, and that they must not be referred to even in argument in other trials.—Steph. Cr. L., i, 558.

In Germany distinct questions are put to the jury by the President of the Court. The public minister, the accused, or any juror may ask that the questions be modified or amplified, and the Court decides on such requests.—T. E., 26th November 1880. There must be separate questions for each punishable act and each accused, and they must be so put as to admit of the answer "yes" or "no." It is a point of controversy among German Juris-Consults whether the President can put alternative questions to the jury, and the point has not yet been decided by the Legislature. The German Code distinguishes these sorts of questions to be put to the jury: (1) the principal question (Hauptfrage) as to whether the act has been committed: (2) the supplementary question (Hülsfrage) when circumstances revealed at the trial appear to modify the nature of the criminal act: (3) accessory questions (Nebenfragen) as to the existence or non-existence of circumstances which, under the Penal Code, aggravate or extenuate or retrospectively exclude all criminality.—Germ. C. P. C., 290—295. As to the retrospective exclusion of criminality, M. Daguin thinks it should be considered in answering the principal question, as it has reference to subsequent circumstances, which, although they do not do away with the criminal character of the act, yet exempt the author from punishment. For instance, it is provided in Article 163 (2) of the Penal Code, that the false witness who retracts his deposition before the authority who has received it, before it has been followed by any prosecution or injury to another person, is exempt from all punishment; see also s. 204 as to the spontaneous renouncement of a duel, after challenge and acceptance; and s. 310 as to the author of a conflagration, who extinguishes the fire before it has been discovered, and before any damage has resulted, and s. 46 as to the abandonment of attempts.

The jury has not to pronounce on the existence of extenuating circumstances unless the question is expressly put, on the demand of the public minister or the accused, or by order of the Court.—Germ. C. P. C., 297. It is otherwise in France. C. P. C., 341. But if the accused be under 18, or a deaf-mute, an accessory question as to discernment must be put.—Germ. C. P. C., 298. After all questions have been put, the public minister and the accused may address the jury on the question of culpability, and again, after the verdict has been rendered, they may make observations as to the application of punishment.—*Id.*, 299, 314.

Procedure where jury differ.

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

"After such a period as the Judge considers reasonable." The exercise of such discretion by a Judge cannot be reviewed by a Court of error.—*Winsor* v. *Reg.*, 1 L. R., Q. B., 289.

303. Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Verdict to be given on each charge.

Judge may question jury.

Questions and answers to be recorded.

Such questions and the answers to them shall be recorded.

"If the jury do not pronounce affirmatively or negatively on facts, necessary to establish the guilt or the innocence of the defendant, the Court shall direct a new trial."—Lou. C. P. C., 380. Article 391 is very important. It enacts that, "if a verdict of acquittal shall be given on any act of accusation, so defective that no judgment could have been given against the defendant if he had been convicted, he shall not be discharged, but may again be indicted and brought to trial for the same offence." Article 395 is as follows:—"In like manner, if the jury bring in a verdict that is neither an acquittal nor a conviction, nor a special verdict, the Court may direct the jury to reconsider the verdict, and it shall not be recorded until it is brought in in some form from which it can be clearly understood what is the intent of the jury, whether to acquit, to convict, or to state facts and leave the judgment to the Court."

It is a general principle in France that the jury are to find all the facts, including the existence of states of mind (circonstances de moralité) which collectively constitute the prisoner's guilt, and that the Court of Assize is to say what is the legal effect of the facts found by the jury, and what the punishment to be inflicted if they amount to a conviction. The object of the questions to each of which the jury must answer yes or no, is to constitute when taken with the answers a statement of facts which will enable the Court to discharge their duty. The result, therefore, of a French trial by jury is not to get a verdict of guilty or not guilty, but to get the facts of the case stated in a form analogous to a special verdict in England, or to a special case in civil matters. If facts are proved at the trial, which, though distinct from, are accessory to the principal accusation, questions may be put to the jury on them. For instance, on a charge of robbery, a question may be asked as to receiving; on a charge of infanticide a question as to the suppression of the *etat civile* of a child (concealment of birth).—See Steph. Cr. L., i, 554, *seq.*

In France, the verdict of the jury is final only if it is clear, consistent, and categorical.—Cass., 9th May 1822, *et passim*; or when it is neither contradictory nor ambiguous.—Cass., 29th April 1819; or when it completely and entirely disposes of all the charges.—Cass., 6th December 1867, *et passim.* In Germany, if the Court considers that the declaration of the jury is not regular in form, or that it is fundamentally obscure, insufficient, or that it contains inconsistencies or contradictions, the President invites them to retire in order to remedy the defects, and this may be done several times until a proper and consistent verdict is returned.—Germ. C. P. C., 309. From the Statement of Objects and Reasons it appears that a declaration is con-

sidered insufficient when it leaves unanswered one or more questions, and obscure, when the sense which the jury attach to it is not clearly apparent, or when it is such that the jury may be suspected of having imperfectly understood the question put to them.

Held, in South Carolina, that where several distinct offences are charged in different counts of an indictment, all growing out of the same act or acts, even though subject to different punishments, a general verdict of guilty may be rendered, under proper instructions.—18 S. C., 149.

Amending verdict.

304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

In Germany, when the jury are invited to retire owing to fundamental defects in the verdict, they are not bound in their new deliberations by any part of their preceding declaration; and if necessary, the former questions put to them may be modified or amplified.—Germ. C. P. C., 306, 311. But the rectified declaration must be written side by side with the anterior declaration, so that the latter remains legible.—*Id.*, 312.

Verdict in High Court when to prevail.

305. When in a case tried before a High Court then jury are unanimous in their opinion or when as many as six are of one opinion, and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases.

If the Judge disagrees with the majority, he shall at once discharge the jury.

If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

Verdict in Court of Session when to prevail.

306 When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall pass sentence on him according to law.

In England, the jury consists of twelve men, and their verdict must be unanimous. In Scotland (2 Hume, 308), the jury consists of fifteen, and a majority suffices. In Scotland, there is an intermediate verdict of "not proven," which is substantially a verdict of "not

guilty," and is *res judicata* barring another trial. In France (C. P. C., 347), the decision of the jury is pronounced according to the majority. The jury consists of twelve, and if the numbers are equal, the accused gets the benefit. So in Germany, C. O. J., 198. There must be a majority of two-thirds (or 8 jurors out of 12) for a decision unfavourable to the accused on a question of culpability. As to extenuating circumstances, if there are six against six, the accused gets the benefit. In other cases the number of voices need not be announced, C. O. J., 198; C. P. C., 262, 297, 307. In France a simple majority suffices for a verdict of extenuating circumstances; for aggravating circumstances a majority of more than seven voices is necessary.

In France, if the accused is convicted, and the Court thinks that the jury are entirely mistaken, it may suspend judgment and send the case to the next session to be submitted to a new jury. After the finding of the second jury, the case cannot again be retried, even though the second finding be the same as the first.—C. P. C., 352.

The English rule laid down in *Bushell's case* is that a jury cannot lawfully be punished by fine, imprisonment, or otherwise, for finding against the evidence, or against the direction of the Judge.—Vaughan, R., 135; 6 St. Tr., 999. The reason for this rule is that the jury originally were in a manner witnesses, being chosen from the hundred where the occurrence took place. It was urged in the above case that the Judge cannot punish the jury for going against their evidence, *when he cannot know what their evidence is.* The jury have other evidence besides what is deposed in Court, for being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must), *though no evidence were given on either side in Court*; but to this evidence the Judge is a stranger.—Broom, Const. Law, (2nd Ed.) 131. Those who object to the provisions of the following section (307) forget what was the origin of trial by jury in England. But for that origin, it seems certain that Vaughan, C. J., would not have laid down the law as he did in Bushell's case.—See notes under s. 219, P. C., and the cases of Sir Nicholas Throckmorton and Lilburne, 1 St. Tr., 869; 5 St. Tr., 445. In *Floyd* v. *Barker*, 12 Rep., 23, it was resolved that when a jury hath acquitted a felon or traitor against manifest proof, then they may be charged in the Star Chamber for their partiality in finding a manifest offender not guilty *ne maleficia remanerent impunita.* Great inroads have been made in England on the institution of trial by jury. The powers of summary conviction vested in Justices of the Peace have been amplified.—Broom, Com. Law. (6th Ed.), 956; 42 & 43 Vict., c. 49. Judges of superior and of county Courts have been empowered in a majority of cases to adjudicate alone on causes heard before them.—*Id.*, 66—79; 15 & 16 Vict., c. 76, ss. 46 & 47; 17 & 18 Vict., c. 125, s. 1, rep. by 46 & 47 Vict., c. 49. See rules of Supreme Court, 1883, Ord. 36, Rules 2—9.

Procedure where Sessions Judge disagrees with verdict.

307. If in any such case the Sessions Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which the

accused has been tried; so completely that he considers it necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed.

Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which the accused has been tried, but he may either remand the accused to custody or admit him to bail.

In dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal; but it may acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

In Italy, if the Judges of the Court of Assize are convinced that the jury are mistaken on the principal fact, they must suspend judgment and send the case to the ensuing Session to be tried by another jury (which must not include any of the former jury). But sentence must be pronounced in accordance with the verdict of the second jury, though it be conformable to the first.—Ital. C. P. C., 509. The same procedure is adopted in France, Austria, and Germany.—Fr. C. P. C., 352; Aust. C. P. C., 332; Germ. C. P. C., 317. But in Germany it is necessary that the jury should be fundamentally mistaken *to the prejudice of the accused.* There is no appeal against the order directing the case to be re-tried. The order is a simple direction, in which no reasons are stated, but it is necessary that all three Judges of the Tribunal should be unanimous.

G.—Re-trial of Accused after discharge of Jury.

Re-trial of accused after discharge of jury.

308. Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

H.—Conclusion of trial in Cases tried with Assessors.

Delivery of opinions of assessors.

309. When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence

for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

Judgment.

The Judge shall then give judgment; but in doing so shall not be bound to conform to the opinions of the assessors.

If the accused is convicted, the Judge shall pass sentence on him according to law.

I.—Procedure in case of previous Conviction.

Procedure in case of previous conviction.

310. In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after a previous conviction for any offenco, the procedure laid down in sections 271, 286, 305, 306, and 309 shall be modified as follows :—

(*a*) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge, unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence.

(*b*) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge.

(*c*) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly; but, if he denies that he has been so previously convicted, or refuses to, or does not, answer such question, the jury or the Court and the assessors (as the case may be) shall then inquire concerning such previous conviction, and in such case (where the trial is by jury) it shall not be necessary to swear the jurors again.

J.—List of Jurors for High Court, and summoning Jurors for that Court.

Jurors' book.

311. In each Presidency-town, the jurors' book for the year current when this Code comes into force shall be taken as containing a correct list of persons liable to serve as jurors under this chapter.

Exemption of special jurors.

Those persons whose names are entered in the jurors' book as being liable to serve on special juries only shall be deemed to be persons privileged and liable to serve

only as special jurors under this chapter during the year for which the said list has been prepared.

Number of special jurors.

312. The names of not more than four hundred persons shall at any one time be entered in the special jurors' list.

As amended by Act V, 1887, s. 2.

Lists of common and special jurors.

313. The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

(*a*) a list of all persons liable to serve as common jurors; and

(*b*) a list of persons liable to serve as special jurors only.

Regard shall be had, in the preparation of the latter list, to the property, character, and education of the persons whose names are entered therein.

No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

The Governor-General in Council in the case of the High Court at Calcutta, and in the case of other High Courts, the Local Government may exempt any salaried officer of Government from serving as a juror.

Discretion of officer preparing lists.

The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said lists as seems to him to be proper, and there shall be no appeal from, or review of, his decision.

In England, the qualification for a common juror is that of being an owner of freehold estate of £10 a year, or a leasehold of £20, or being a householder rated at £20, or in Middlesex at £30. The qualification of special jurors is the occupation of a house of £50 in large towns, and £100 elsewhere, or being a banker or merchant, or entitled to be called Esquire.—33 & 34 Vict., c. 77, s. 6.

Publication of lists preliminary and revised.

314. Preliminary lists of persons liale to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the local official Gazette before the fifteenth day of April next after their preparation.

Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid,

shall be published once in the local official Gazette before the first day of May next after their preparation.

Copies of the said lists shall be affixed to some conspicuous part of the court-house.

Number of jurors to be summoned in Presidency-town.

315. Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions in each Presidency-town at least twenty-seven of those who are liable to serve on special juries, and fifty-four of those who are liable to serve on common juries.

No person shall be so summoned more than once in six months unless the number cannot be made up without him.

Supplementary summons.

If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

Summoning jurors outside the Presidency-towns.

316. Whenever a High Court has given notice of its intention to hold sittings at any place outside the Presidency-towns for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

Military jurors.

317. In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of Commissioned and Non-Commissioned Officers in Her Majesty's Army resident within ten miles of its place of sitting, as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent military duty or for any other special military reason.

Failure of jurors to attend.

318. Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt, and be liable by order of the Judge to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment in the civil jail until the fine is paid.

K.—List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.

Liability to serve as jurors or assessors.

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside.

In France jurors must be 30 years of age and in full possession of political and civil rights.—C. P. C., 381.

Exemptions.

320. The following persons are exempt from liability to serve as jurors or assessors, namely:—

(*a*) Officers in civil employ superior in rank to a District Magistrate;

(*b*) Judges;

(*c*) Commissioners and Collectors of Revenue or Customs;

(*d*) Persons engaged in the Preventive Service in the Customs Department;

(*e*) Persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;

(*f*) Persons actually officiating as priests or ministers of their respective religions;

(*g*) Persons in Her Majesty's Army, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors;

(*h*) Surgeons and others who openly and constantly practise the medical profession;

(*i*) Persons employed in the Post Office and Telegraph Departments;

(*j*) Persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641;

(*k*) Other persons exempted by the Local Government from liability to serve as jurors or assessors.

List of jurors and assessors.

321. The Sessions Judge and the Collector of the District or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such and not likely to be successfully objected to under section 278, clauses (*b*) to (*h*), both inclusive.

The list shall contain the name, place of abode, and quality or business of every such person; and if the person is an European or an American, the list shall mention the race to which he belongs.

Publication of list.

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magistrate and of the District Court, and in some conspicuous place in the town or towns in or near which the persons named in the list reside.

Objections to list.

323. To every such copy shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the Sessions court-house, and at a time to be mentioned in the notice.

Revision of list.

324. For the hearing of such objections, the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may establish his right to any exemption from service given by section 320, and insert the name of any person omitted from the list whom they deem qualified for such service.

In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid,

the name of the proposed juror or assessor shall be omitted from the list.

A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

Annual revision of list.

325. The list so prepared and revised shall be again revised once in every year.

The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

District Magistrate to summon jurors and assessors.

326. The Sessions Judge shall ordinarily, three days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial.

The names of the persons to be summoned shall be drawn by lot in open Court, excluding those on the revised list who have served within six months, unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

Power to summon another set of jurors or assessors.

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever for other reasons such direction is found to be necessary.

Form and service of summons.

328. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

When Government or Railway servant may be excused.

329. Where any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears, on the representation of the head of the office in which he is employed, that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

Court may excuse attendance of juror or assessor.

330. The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session.

List of jurors and assessors attending.

331. At each session, the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

Such list shall be kept with the list of the jurors and assessors as revised under section 324.

A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

Penalty for non-attendance of juror or assessor.

332. Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court after being ordered to attend, shall be liable, by order of the Court of Session, to a fine not exceeding one hundred rupees.

Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

In default of recovery of the fine by such attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

L.—Special Provisions for High Courts.

Power of Advocate-General to stay prosecution.

333. At any stage of any trial before a High Court under this Code before the return of the verdict, the Advocate-General may, if he thinks fit, inform the Court

on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

Time of holding sittings.

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

Place of holding sittings.

335. The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor-General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct.

But it may, from time to time in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

Notice of sittings.

Such officer as the Chief Justice directs shall give notice beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

This appears to be the only section in the Code in which anything is said as to place of sitting. The German Code of Judicial Organisation (98) provides that Courts of Assize may sit in any part of their jurisdiction. This provision is sometimes made use of in case of epidemic, of an offence committed inside a prison, to avoid excessive expense in summoning large numbers of witnesses from distant places, or when the public safety may be endangered by the transfer of a large number of witnesses or accused under custody.

Place of trial of European British subjects.

336. The High Court may direct that all European British subjects and persons liable to be tried by it under section 214, who have been committed for trial by it within certain specified districts or during certain specified

periods of the year, shall be tried at the ordinary place of sitting of the Court,

or direct that they shall be tried at a particular place named.

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

Tender of pardon to accomplice.

337. In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence, or, with the sanction of the District Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof.

Every person accepting a tender under this section shall be examined as a witness in the case.

Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.

Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section, shall record his reasons for so doing; and when any Magistrate has made such tender, and examined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.

In England, accomplices need not be pardoned in any case before giving evidence. Where an accomplice has given evidence against his companions, it is a mere matter of discretion with the prosecutor whether to indict the former afterwards, and the Judge has no power to quash such indictment if prosecuted. But in Scotland, the Court will quash the indictment, and the witness is so informed before his examination.—2 Hume, 367. In India, accomplices need not be pardoned before they are admitted as witnesses; but it has been held that persons actually accused and in the dock cannot be examined; but they may be examined after they have been discharged, acquitted or convicted.—I. L. R., 1 Bom., 610, 619.

In China, whoever, having committed an offence, surrenders himself voluntarily, and acknowledges his guilt to a Magistrate, before it is otherwise discovered, shall be freely pardoned; but all claims upon his property, on the part of Government or of individuals, shall nevertheless be duly liquidated. If the voluntary confession is inaccurate and imperfect, he shall be liable to punishment for as much of the offence committed by him as he had endeavoured to conceal. If the offender does not confess his guilt until he is informed that a charge or information is to be laid against him, the punishment is not entirely remitted, but mitigated two degrees. Restoration of plunder or of a bribe is deemed equal to confession at a legal tribunal, and entitles to pardon; but if such restitution takes place only after he knows he will be complained against, the punishment is mitigated by two degrees.—China P. C., 25.

The Indian Code is not so well adapted as the French Code for inducing accomplices to give information. In India the offence must have been committed and partially discovered; and it must be an offence which is triable only by a Court of Session, that is, murder and a few other heinous offences. In several cases the French Penal Code contains sections enacting that guilty persons will be exempt from punishment, if, before the completion of the offence and before the institution of any prosecution, they inform the authorities, or even if, after commencement of prosecution, they procure the arrest of the guilty persons.—See ss. 108 (offences against the State), 138 (counterfeit coin) Fr. P. C. See Belg. P. C., 136.

No doubt the Indian police often send up an implicated person as the principal witness, and, if this were not done, the case would often not be sent up at all. But what is required is that the commission of offences should be *prevented* by the certain knowledge that information must procure a pardon. However, persons who thus give information in France are liable to be placed under police supervision for life or for a time.

Power to direct tender of pardon.

338. At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same conditon to such person.

Commitment of person to whom pardon has been tendered.

339. Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered., or for any other offence of

which he appears to have been guilty in connection with the same matter.

The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section.

No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Right of accused to be defended.

340. Every person accused before any Criminal Court may of right be defended by a pleader.

In Italy accused persons charged with crimes or delicts, must be defended. If he has no defender, the Court will appoint one for him. —Ital. C. P. C., 275. In Italy, an accused must be defended by an advocate, &c., and such advocate, if named, must undertake the duty. If he refuses without any lawful excuse, or if his defence is careless and perfunctory (trascurata), the Court can warn him and, in the case of a second offence, can suspend him from the exercise of his functions for not less than 15 days or longer than three months. The same disciplinary measures can be taken against advocates and procureurs, who, by their conduct of the case or by their act, are wanting in the respect due to the dignity of the Judges, or are guilty of any other kind of reprehensible conduct in the exercise of their functions, without prejudice to the provisions of Article 480 of the Penal Code, if the omission or failure of duty constitutes a particular offence. In case of suspension, there is an appeal.—Ital. C. P. C., 632—637. A similar right of being defended is given in England by 11 and 12 Vict., c. 43, s. 12; but it does not give the defendant any right to have the case adjourned in order to procure the assistance of counsel or attorney, although he has previously had no opportunity of procuring it.—*R.* v. *Biggins*, 5 L. T., N. S., 605.

In trials before the Court of Assize in France, the accused is not allowed to communicate with his counsel till after his examination by the President of the Court of Assize.—C. P. C., 302. The President is bound to warn the counsel that he must not say anything *against his conscience* or against the respect due to the laws, and that he must express himself with decency and moderation.—See notes under s. 256, *supra*.

In England it is usual to allow counsel to address the justices on behalf of the accused, but this is in the justices' discretion.

In India, as in England, the prisoner is not entitled to have counsel assigned to him to defend him gratuitously (except in cases of treason in England). In capital cases the Judge generally requests some counsel, without an attorney, so to act; and a counsel never refuses. In France (C. P. C., 294) the accused chooses his own counsel; and if he fails to do so, the Judge must appoint one for him. In Scotland every prisoner, however poor, is entitled by Statute 1587, c. 91, to have a counsel to defend him. If no other counsel are present, the sheriff of the country, who is a counsel generally in actual practice,

and who must give his attendance at circuit, is named by the Court to defend.—Paterson, Eng. and Scotch Law, p. 331.

In New York if the indictment be for an offence punishable with death, two counsel on each side may argue the case to the jury; in which case they must do so alternately. If it be for any other offence the Court may, in its discretion, restrict the argument to one counsel on each side.—N. Y. C. P. C., 442. The same rule applies to the hearing of appeals. The counsel for the defendant is entitled to the closing argument.

In Louisiana, if the accused alleges that he is unable to procure counsel, the Court shall assign some licensed attorney to conduct his defence under his direction.—Lou., C. P. C., 289. But a Magistrate has no power to assign counsel.

In serious cases both in England and on the Continent, the Court appoints counsel for the accused. Lou. P. C., 15, enacts that "if the accused declare himself unable to procure counsel, the Court shall assign him an advocate."

In Canada, persons on trial for felony may make full defence by two counsel and no more.—8 L. C. J., 85. Two parties accused of the same offence are not entitled to a separate defence.—5 R. L., 746. In one case it was held that only one counsel might argue, no matter how many accused persons there were.

In Germany the accused *may* be defended in all cases. He *must* be defended before the tribunal of the Empire (which takes cognizance of cases of treason, Article 136 of the *Code d'Organisation Judiciaire*) and before the *Cour d'Assises* (which tries all crimes which are not triable by the Criminal Chambers of the District Tribunals). The employment of a defender is also obligatory in the following cases: (1) when the accused is deaf or dumb, or is under 16: (2) when the offence is a crime and the accused demands a defender. But this does not apply to delicts which only become crimes by reason of la récidive. The President of the Court must appoint a defender, if the accused has not already chosen one. If the person appointed does not appear, or refuses to act; any costs occasioned by his refusal are charged to him, and he is also liable to the disciplinary punishments laid down in the law of the 1st July 1878, concerning legal practitioners, namely, warning, reprimand, fine up to 3,000 marks, exclusion from all practice. Judicial functionaries (who are not Judges) and Jurisconsults, who have passed the first examination, may be named as defenders as well as advocates. Several accused may be defended by one person, if their interests do not clash. In case of doubt, the Court will decide this point.—Germ. C. P. C., 137—146. The husband of an accused woman may take part at the trial, and will be heard, if he demands it, but a similar right is not given to the wife of the accused. The father and guardian of a minor have the same right. The Advocate appointed by the Court to defend the accused shall be remunerated according to a fixed tariff, the amount being payable from the public treasury—*id.*, 149, 150. Under the law of the 7th July 1879 advocates are paid as follows in penal cases: in the lower Courts (tribunal des échevins) 12 marks; in the Criminal Chamber of the District Tribunal, 20 marks: in the Court of Assize or the Tribunal of the Empire, 40 marks. If the trial lasts several days, and in one or two other special cases, the rate may be increased

by one-half. Only enrolled advocates and professors of law have the right to defend an accused: other persons cannot do so except with the permission of the Court.—Germ. C. P. C., 138.

In Austria accused and his defender can question witnesses only through the President of the Court. In Germany the Court may permit them, and also the public minister and jurors, to put questions direct. The accused can never be interrogated except by the President.—Aust. C. P. C., 319; Germ. C. P. C., 239. The Court may withdraw its permission, if abused, and may always prevent the putting of any improper or irrelevant question.—Germ. C. P. C., 240.

In England not more than two counsel are entitled to address the Court for a prisoner during the trial upon a point of law. Several defendants may appear by separate counsel, and each is entitled to a reply.—*R.* v. *Bernard*, 1 F. & F., 240; also *O'Connell* v. *Reg.*, 11 C. & F., 155.

In England a Queen's counsel ought not to be counsel for the defendant without a licence from the Queen, or at least a letter from the Secretary of State.—*R.* v. *Bartlett*, 2 C. & K., 321; see also *R.* v. *Jones*, 9 C. & P., 401. Government pleaders in India should not be permitted to appear for accused persons in trials or appeals of any importance.

In Austria the President must remind the parties, after a case is called, "that every person appearing before the Court must conduct himself with the reverence and moderation which is due to it, and in particular that the duty of the counsel of the parties is only to serve the cause of truth and justice; that, while it is allowable to avail themselves of all that is necessary for the defence of their clients, they should avoid all that is contrary to their consciences or the laws." The accused may not advise with his counsel in regard to his answers, before replying to questions addressed to him.

Procedure where accused does not understand proceedings.

341. If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

At trials in France, if the accused is a deaf-mute and cannot write, the President must appoint as interpreter the person who is most accustomed to speak with him: so in the case of a deaf-mute witness. If either can write, the questions are written down and shewn to the deaf-mute, who must write down his answers.—C. P. C., 333.

Power to examine the accused.

342. For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any inquiry or trial,

without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

No oath shall be administered to the accused.

When an accused is to be tried by the Court of Assize, the Italian Code directs that he must be examined by the President of the Court within 24 hours of his arrival in the town where the Assizes are to be held.—Ital. C. P. C., 456.

In Italy the case is begun by an examination as to the general situation and the facts which constitute the subject of the accusation. At any stage of the case, the Court can make one or more of the accused retire in order to interrogate them separately upon every fact of the case. But when this is done, the Court must, before proceeding, inform the accused of what was happened in his absence.—Ital. C. P. C., 283. It is the same in France, C. P. C., 327.

Several recent Statutes in England now enable parties standing in the position of accused persons to be sworn. Thus by the Mines Regulation Act, 1872 (35 and 36 Vict., c. 76, s. 63 and c. 77, s. 34, para. 4), an owner, agent or manager under charge of contravening either Act may, if he thinks fit, be sworn. By sec. 11 of the Conspiracy, &c., Act 1875 (38 and 39 Vict., c. 86) both parties may be sworn in respect of offences under secs. 4—6. By the Licensing Act of 1872 (35 and 36 Vict., c. 94, s. 51, para. 4) the defendant and his wife are competent to give evidence in summary proceedings under the Act. By the Explosives Act, 1875 (38 Vict., c. 17, s. 87), an owner or occupier may, when charged in respect of any offence under the Act by another person, if he thinks fit, be sworn and examined as an ordinary witness in the case. And in 1877 it was enacted by the Law of Evidence Amendment Act (40 and 41 Vict., c. 14, s. 1), that any indictment or proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and on the trial of any other indictment or proceeding instituted for the purpose of trying a civil right only, every defendant, &c., and the wife or husband of any such defendant, shall be admissible witnesses and *compellable* to give evidence. See also the Employers' Liability Act, and the still more recent Criminal Law Amendment Act. Many more recent Statutes, such as the Margarine Act of 1877, make the accused a competent witness; and a Bill is now before

Parliament to make accused persons competent witnesses in all cases. As to the examination of the accused, Livingston remarks in his Introductory Report to the Louisiana Code of Procedure: "In the examination of the accused, the advantage is that, if guilty, he will frequently betray himself by his own story. The truth would be a confession. He must have recourse, therefore, to falsehood; but, as error is infinite, he will state some things which can be easily disproved by circumstances or by other witnesses, and the investigation of which would lead to his conviction. Suppose him, on the other hand, to be innocent: his statements would contain the truth, because he has no need of concealment, and the circumstances and witnesses, which would detect his falsehood, in the one case, will evince his truth in the other. If the Magistrate, who examines in this preparatory stage, were the tribunal which finally tries, there would be another advantage in permitting the interrogation of the accused, his looks, his manner of answering, his hesitation or promptitude, even his silence, would have their effect in determining on his innocence or guilt."

Stephen, referring to early trials in England, says: "I am by no means sure that the practice of examining the prisoner pointedly and minutely at his trial was not an advantage to him if he was innocent; and I doubt whether the absence of all rules of evidence, and the habit of reading depositions instead of having the witnesses produced in Court, made so much difference as our modern notions would lead us to believe." The writer of this is not only a renowned jurist, but one of the best of the English Judges.

As to why an accused person is presumed to be innocent, Stephen says that "the true answer is, not that the presumption is probably true, but that society in the present day is so much stronger than the individual, and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous. It is, however, a question of degree, varying according to time and place, how far this generosity can or ought to be carried. Particular cases may well be imagined in which guilt instead of innocence would be presumed .... Suspected people, after all are generally more or less guilty, and though it may be generous, for the reason already given, to act upon the opposite presumption, I do not see why a Government, *not strong enough to be generous, should shut their eyes to real probabilities in favour of a fiction.* This principle must be admitted, and the procedure of the period in question must be judged in the light of it, before it can be fairly criticised. I think such criticism would not be wholly unfavourable to it. The trials were short and sharp; *they were directed to the very point at issue*, and, whatever disadvantages the prisoner was under, he was allowed to say whatever he pleased; *his attention was pointedly called to every part of the case against him, and if he had a real answer to make, he had the opportunity of bringing it out* effectively and in detail." Magistrates in India not only neglect their plain duty, but they needlessly lengthen cases, by omitting to put questions under s. 342. Even in Calcutta the strange spectacle is sometimes witnessed of Magistrates refraining from putting questions, though there may be much in evidence against the accused, simply because counsel have persistently objected. Such want of moral courage is deplorable, and now and again it must have the result

of defeating the ends of justice. Indian Magistrates are sworn to administer Indian and not English law; and if they would only study the English law for themselves, they would find it very different from what it is often asserted to be.

As to examining the accused, Stephen says: "I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. It must be remembered that most persons accused of crime are poor, stupid, and helpless."—Cr. L. i., 442. He then goes on to give specimens of a considerable number of cases "which have led me to form an opinion, that when a wrong conviction does occur in an English Criminal Court, it is usually caused by treating a poor and ignorant man as if he were rich, well-advised, and properly defended. . . A poor and ill-advised man is always liable to misapprehend the true nature of his defence, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness. I do not think that any evil would ensue to the wealthy and well-advised from being placed in the same position." Stephen remarks that the parties are competent witnesses in civil cases, and there is no reason why the same rule should not apply to criminal cases. He thinks the accused should be examined in chief by his own counsel, and cross-examined by the counsel for the Crown.

As to s. 342, Stephen remarks: "The words specifying the purpose for which questions are to be asked were not in the Code of 1872, which authorized the examination of the accused without assigning any reason for it. Perhaps the expression was introduced in the Code of 1882 in order to soften what many people consider a harsh proceeding. For my own part I regret the alteration. It will either be inoperative or most embarrassing, and it looks like an apology for what does not require one. It is, however, hypocritical, for the Code contains no provision as to what is to happen if the questioning does not conform to the directions of the Code, and it specifically enacts that 'the Court and jury (if any) may draw such inference from' the refusal of the accused to answer or from his answers as they please. Besides, in practice, every question any one could want to ask might be justified by the terms of the section; *e. g.*—'The witnesses say they saw you at this place. Were you there or not, and, if not, where were you?' The words thus make hardly any difference." These remarks are so apposite that they should be posted up in every Court. Law is a means to an end, the end being justice. The High Court have, in some cases, ordered new trials because they considered the accused had been questioned too much. But such questioning certainly does not constitute an irregularity under s. 530, which vitiates proceedings. Police-officers are sometimes prosecuted for disobeying specific directions of the law, such as those contained in ss. 103, 154, 155, 167, C. P. C. There is no reason why judicial officers should not be prosecuted under s. 166, Penal Code, and other sections, when they wilfully disobey a plain direction of the law such as that contained in s. 342, C. P. C. By doing so, they cause injury to Government, the public, and the private prosecutor, and every man is presumed to intend the probable consequences of his acts. Such infringement of the law is not confined to Native Deputy Magistrates; Civilian Magistrates, Sessions Judges, and High Court Judges are sometimes guilty of it.

In England it is a rule, applying equally to indictments and to summary process, that one of several prisoners jointly indicted (while in charge of the jury) cannot be called as witness for another. —*R.* v. *Payne*, L. R., 1 C. C. R., 349. As to what constitutes a criminal proceeding in view of the competency of witnesses, it has been suggested that the test of a defendant's admissibility as witness is whether he could or could not be convicted without a *mens rea*. The test, according to Lord Campbell, is to consider whether it is sought to recover a sum of money in the nature of a debt from a person as in bastardy cases, or to inflict punishment of an exemplary and public nature.

In France the accused is bound to answer questions put to him: in Germany he is not so bound.—Germ. C. P. C., 136.

In India, in cases of forgery or other cases, the Courts sometimes make the accused write a few words with the object of comparing the writing with some writing in dispute. M. Daguin thinks that this is not permitted by Article 93 of the German Code. But under the second clause of Article 136 there is nothing to prevent the accused from doing so in his own interests. This clause is as follows: "the examination of the accused must give him an opportunity of removing the suspicions against him and of showing circumstances which tell in his favour."

When, during the examination of a witness, the prisoner interposes observations which are material, they should be taken down by the Magistrate.—*R.* v. *Walier*, 2 C. & K., 223.

No influence to be used to induce disclosures.

343. Except as provided in sections 337 and 338, no influence, by means of any promise or threat, or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

Power to postpone or adjourn proceedings.

344. If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, by order in writing, stating the reasons therefor, from time to time postpone or adjourn the same on such terms, as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Remand.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Reasonable cause for remand.

EXPLANATION.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and

it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

"Or any other reasonable cause." The absence of counsel for a prisoner, although unavoidable, is no ground for postponing the trial of a case; and the refusal to postpone by a Magistrate is no ground for an appeal, although the prisoner be convicted. Kyshe's Straits Settlements Rep., iii, 50.

An application to postpone the trial of a prisoner charged with murder, in order to afford an opportunity of investigating the evidence and characters of certain witnesses, who had not been examined before the committing Magistrate, but who were to be called for the prosecution to prove previous attempts by the accused on the life of the deceased, was refused.—*R.* v. *Johnson*, 2 C. & K., 354.

Remands in England may be for periods not exceeding eight days to any prison or place of security; if the remand do not exceed three days, the Justices may verbally order the constable or other person in whose custody the accused is to keep the party accused in his custody.—11 and 12 Vict., c. 42, s. 26; Steph. Dig., C. P. C., 117.

Compounding offences.

345. The offences punishable under the sections of the Indian Penal Code described in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Uttering words, &c., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt ...	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force.	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ..	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Criminal trespass ...	447	The person in possession of the property trespassed upon.
House-trespass ...	448	
Criminal breach of contract of service.	490, 491, 492	The person with whom the offender has contracted.
Adultery ...	497	The husband of the woman.
Enticing or taking away or detaining with a criminal intent a married woman ...	498	
Defamation ...	500	The person defamed.
Printing or engraving matter knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter ...	502	
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.

The offence of voluntarily causing hurt, voluntarily causing grievous hurt, causing hurt by an act which endangers life, or causing grievous hurt by an act which endangers life, punishable under section 324, section 335, section 337, or section 338 of the Indian Penal Code, may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

When the person who would otherwise be competent to compound an offence under this section is a minor, an

idiot or a lunatic, any person competent to contract on his behalf may compound such offence.

The composition of an offence under this section shall have the effect of an acquittal of the accused.

No offence not mentioned in this section shall be compounded.

In Italy ascendants can procure the remission of half a correctional or police sentence, when the offence has been committed against themselves by descendants in a direct line. Similarly, a husband or wife can do the same, when the offence has been committed by one against the other.—Ital. C. P. C., 603.

In England, when a misdemeanour has been committed, the civil remedy is not suspended; but when an indictment and a civil action are both pending, the Court will either grant a *nolle prosequi* or compel the prosecutor to elect which remedy he will pursue. In Scotland the civil remedy is not barred in any case; and where the injured party has recovered damages, the Crown may still prosecute. Pat.-Eng. and Scotch Law, p. 319, and cases there quoted.

In New York all misdemeanours (for which there is a remedy by civil action) may be compromised except when they have been committed:—

1. By or upon an officer of Justice, while in the execution of the duties of his office:
2. Riotously: or
3. With an intent to commit a felony.—N. Y. C. P. C., 731.

In the matter of compounding, it is perhaps to be regretted that the Legislature has not left more to the discretion of Magistrates. Acts, falling within the definition of theft, are often of such a nature that their composition cannot be injurious to the community. The 24 & 25 Vict., c. 96 (Larceny Act), s. 188, and the 24 & 25 Vict., c. 97 (Malicious Injury to Property Act), s. 66, enable a Justice, where any person has been summarily convicted of a first offence against either Act, to discharge the offender upon his making such satisfaction to the party aggrieved for damages and costs as shall be ascertained by the Justice.

It has once or twice been acted on as established law, that when the facts affording a cause of action in tort are such as to amount to a felony, there is no civil remedy against the felon for the wrong, at all events before the crime has been prosecuted to conviction, and as before 1870 (33 & 34 Vict., c. 23), a convicted felon's property was forfeited, there would at common law be no effectual remedy afterwards. So that the rule that "the trespass was merged in the felony" was substantially correct. But doubt has been thrown on this rule in recent cases. It may be the duty of the person wronged to prosecute for the felony before he brings a civil action; but, as remarked by the Judges in the case of *Wells* v. *Abrahams*, "by what means that duty is to be enforced, we are nowhere informed."—L. R., 7 Q. B., 563. It has been suggested that the Court might in a proper case, on the application of the Crown or otherwise, exercise its summary jurisdiction to stay proceedings in the civil action: but there is no example of this. There is a tendency to discredit the rule as a mere *cantilena* of text-writers founded on ambiguous or

misapprehended cases. At the same time it is certain that the Judges consulted by the House of Lords in *Marsh* v. *Keating* (1 Bing. N. C., 198, 217) thought such a rule existed.—Pollock, Torts, 172.

Procedure of Provincial Magistrate in cases which he cannot dispose of.

346. If, in the course of an inquiry or a trial before a Magistrate in any district outside the Presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate having jurisdiction, as the District Magistrate directs.

The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

"If the Magistrate considers him an habitual offender." "If any person, having been twice previously convicted of crimes (*i.e.*, offence punishable with confinement at hard labour or forfeiture of any civil or political right), no matter of what nature, shall a third time be convicted of any crime afterwards committed, he shall be considered as unfit for society, and be imprisoned at hard labour for life."—Lou. P. C., 53.

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.

347. If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained.

If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

Trial of persons previously convicted of offences against coinage, stamp-law or property.

348. Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or

upwards, shall ordinarily, if the Magistrate before whom he is accused considers him an habitual offender, be committed to the Court of Session or High Court, as the case may be; or, in districts in which the District Magistrate has been invested with powers under section 30, placed on his trial before such Magistrate.

Procedure when Magistrate cannot pass sentence sufficiently severe.

349. Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Subdivisional Magistrate to whom he is subordinate.

The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence; and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law: Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

350. Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and re-commence the inquiry or trial;

Provided as follows:—

(*a*) In any trial, the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard:

(*b*) The High Court, or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate, may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by

the Magistrate before whom the conviction was had, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby; and may order a new inquiry or trial.

Nothing in this section applies to cases in which proceedings have been stayed under section 346.

"Magistrates subordinate to the District Magistrate." See s. 17, *supra*.

"Inquiry." See s. 4 (*c*), *supra*. In inquiries preliminary to commitment, the accused has no right to demand that the witnesses be re-heard; and apparently he has not the right in any of the miscellaneous inquiries (ss. 117, 145, &c.) under the Criminal Procedure Code.

With regard to cases before Benches, in which the evidence for the prosecution is perhaps heard on one day, and the evidence for the defence on another, it is sufficient if any one of the Magistrates present at the first hearing be present at the adjourned hearing. But where a Bench acquitted an accused (none of the Magistrates being the same as those who had adjourned the case for the evidence for the defence), the High Court set aside the acquittal and ordered a re-trial.—I. L. R., 12 Calc., 558.

The power given by this section to a Magistrate does not extend to a Sessions Judge.—I. L. R., 3 Mad., 112.

Detention of offenders attending Court.

351. Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of examination, for any offence of which such Court can take cognizance, and which, from the evidence, he may appear to have committed; and may be proceeded against as though he had been arrested or summoned.

When the detention takes place in the course of an inquiry under Chapter XVIII, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh and the witnesses re-heard.

Courts to be open.

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

Article 510 of Louisiana Procedure Code enacts that in prosecutions for assault with intent to ravish, rape, adultery, offences

against decency, and defamation implying a charge of such offences, no person shall be present but the Magistrate, public prosecutor, accused and his counsel, complainant, certain officers of justice, the witnesses, and such persons, not exceeding ten for each party, as the complainant and the accused may desire to have admitted. In making the report of any such trial, *the reporter shall not give the details of the evidence, or publish the names of the witnesses.* These are excellent provisions of law.

The Court of a Justice in England, during an inquiry preliminary to commitment, is not an open Court; but in practice, all persons are generally allowed to attend, except when details are indecent and unfit for a general audience.—11 and 12 Vict., c. 42, s. 19.

Louisiana Procedure Code 17 enacts that "the Court may, on the prayer of the prosecutor or the accused, direct witnesses to withdraw until they are called for examination; and may also remove such persons as shall obstruct the administration of justice." See under following section.

In England, a Court of summary jurisdiction has the same power as superior Courts of excluding women and boys in certain cases, as it possesses that of expelling disorderly persons, &c.; and it may also, of its own motion, or on the request of either party, exclude witnesses. Where, however, a witness has remained after an order to leave, his testimony cannot on that ground be rejected.—*Chandler* v. *Horne*, 2 Moo. and Rob., 423.

The presiding officer, whether he be Judge, Coroner, Justice, or Sheriff, has the control of the proceedings and the power of admission or exclusion according to his own discretion.—*Garnett* v. *Ferrand*, 6 B. & C., 627. In all Courts of Justice there are occasions when matters are or ought to be conducted in privacy and to avoid scandal; and it rests with the Judge of the Court, *exclusively and without appeal*, to determine when such an occasion has arisen. *The propriety of his decision cannot be questioned in any action;* for this being a matter within his jurisdiction, and no Judge being amenable to an action for anything done in the execution of his office, it follows, that no one has a remedy by way of damages for any mistake, and this is the rule applicable to all Courts, great and small. In one case G., a reporter for the press, entered and took notes at a Coroner's inquest which excited great interest, and the Coroner requested him to leave, and on refusal, with the aid of his servant, turned G. out, who afterwards brought an action of trespass for the assault; and the Court held that the power of exclusion was necessary to be confided to every Judge for the due administration of justice, and there was no remedy by action against him for any apparent arbitrary conduct. —See Paterson, Lib. Pr., 125.

In Italy, if the accused insults the witnesses or any other person present, or if he disturbs the proceedings in any way, he may be made to leave the Court, or taken back to jail, if he is not on bail, and the case will proceed in the presence of his defender. In Italy, every accused must be defended—See under s. 340. Ital. C. P. C., 628.

In Austria, the Court can order the trial to be secret, for reasons of decency, and out of regard for the shame of the complainant or

witnesses, for public safety and propriety, or on the common demand of the complainant and accused. In such a case only the counsel and five "confidential" persons on either side are permitted to be present.

In Germany Courts are open: but the Judge may order the trial to take place with closed doors, if publicity may cause danger to public order or harm to morality.—C. O. J., 170—173.

As a general rule, trials in Germany are public; but in cases concerning marriage, publicity is forbidden at the request of either party, and in every case the Court may order the trial to take place with closed doors, if danger to the public order or morals is likely to result from publicity.—Germ. C. O. J., 170—173. The Statement of Objects and Reasons of this Code mentions the counterfeiting of coin among the offences in which publicity of trial might present a danger to the public order. The discussion as to whether the Court is to sit with closed doors must not be public, but the order for closed doors must be pronounced publicly in open Court. Notwithstanding such order, the President may authorize any particular person or persons to be present. The following persons may be prevented from entering a Court, children, persons not in the enjoyment of civil rights, and those who appear in a state not befitting the dignity of the Court. —Germ. C. O. J., 174—176. M. Dubarle, in his edition of the Code, mentions persons who are intoxicated, or dressed in an indecent manner, or accompanied by animals. Advocates, not engaged in the case, are excluded in the same way as the public.

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

Evidence to be taken in presence of accused.

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII, and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

In Italy, with certain exceptions, cases must be heard in public, under pain of nullity. But, if publicity is dangerous to morality or good order, the Court may, of its own accord or at the request of the public minister, direct that the case be heard with closed doors.—Ital. C. P. C., 268.

In Italy persons of 14 years of age or over are competent witnesses, if they are not disqualified by ss. 25 and 374 of the Penal Code. By these sections persons sentenced to degrading punishments (peines infamantes), or who have committed perjury, cannot give evidence or be named as experts except to give simple statements (de simples indications). Those under 14 may, also give simple statements (indications ou eclaircissements), but not on oath. Near relatives of the accused are not competent witnesses; neither are husband or wife, father and adopted son, &c. But such

persons can testify, if a crime has been committed against any of the family, and proof cannot be obtained in any other way. The above provisions are prescribed under pain of nullity (à peine de nullité), but if no objection is made before the above persons are heard as witnesses, the proceedings are valid.– Ital. C. P. C., 285—290.

Before an oath is administered to a witness, he must be admonished as to the moral importance of the act, the religious obligation contracted before God, and the punishment provided for false testimony and concealment of the truth.—Ital. C. P. C., 299.

Under the Summary Jurisdiction Act in England (11 & 12 Vict., c. 43, s. 13), if the defendant be absent, and service of summons be duly proved, "the Justice or Justices may either *proceed to hear and determine the case in the absence of the defendant*, or they may issue a warrant and adjourn the case until the apprehension of the defendant."

The New York Code authorizes a Magistrate to exclude all witnesses except the witness under examination, and to keep the witnesses separate.—N. Y. C. P. C., 201. This is nearly always done in India. In France, the witnesses are kept in a room outside the Court and brought in to depose one by one. Precautions are taken to prevent the witnesses from talking together about the offence or the accused.—C. P. C., 316. After being examined, witnesses remain in the Court.—*Id.*, 320. Paterson remarks that it is the practice to allow all the other witnesses to be in Court while any one is being examined, unless either party object, whereupon the Court, as a matter of course, orders the others to be excluded. But this does not appear to be the practice now. As to Scotland, see 2 Hume, 377; but now witnesses are not absolutely rejected on the ground of having been present in Court, it being in the discretion of the Court to admit them, if the irregularity was unintentional.—3 & 4 Vict., c. 59, s. 3. There is no rule on the subject in India. See notes under previous section.

In Louisiana, "the examinations of the witnesses shall be read to the accused; and, *if he request it*, the witnesses (if they are yet alive and within the State) shall be summoned to attend, &c."—Lou. C. P. C., 172.

Article 193 of the New York Criminal Procedure Code enacts that the Magistrate must, in the first place, read to the defendant the depositions of the witnesses examined on the taking of the information, and *if the defendant request it*, must summon the witnesses so examined, if they be in the country. It thus appears that a defendant may be convicted on evidence taken in his absence.

That a witness who has under order been sent out of hearing has heard some of the testimony on the side opposed to that on which he was called, may be a ground to attach him for contempt, but not, under Georgia Code, s. 3863, to exclude his testimony.—65 Ga., 330. Though the Circuit Court exercises its discretion in acting upon the rule of excluding witnesses from the Court-room, which is not subject to review on appeal, yet the rule ought not to be applied to the exclusion of the agent of either of the parties necessarily absent, whose presence is required by counsel on account of his knowledge of the facts of the case.—66 Ala., 244.

Articles 470—476 of the German Code of Criminal Procedure are special provisions for proceeding, in their absence, against those who leave the country to avoid military service.

"In the presence of the accused."—In Germany, if there is reason to fear that a co-accused or that a prisoner will not speak the truth, if interrogated in the presence of the accused, the Judge may order the accused to be taken out of Court during the examination ; but when he is brought in again, he must be informed of what has taken place in his absence. This procedure must also be followed, if the accused has to be removed from the Court in order to preserve order. —Germ. C. P. C., 246, and *Coded Organisation Judiciaire*, 178. Witnesses and experts, after being examined, must remain in Court, unless they get permission to go away.

Witnesses (Scotland) should not be examined in the presence of other witnesses. Hume ii, 82 ; Alison ii, 141.

The prisoner has a right to be present at the trial so long as he conducts himself properly, but the Court may, in its discretion, permit his absence in cases of misdemeanour, and may proceed with the trial in his absence in cases in which he has pleaded to an indictment or information in the High Court (Queen's Bench Division). If a prisoner so misconducts himself as to make it impossible to try him with decency, the Court, it seems, may order him to be removed and proceed in his absence.—Steph. Dig. C. P., 302, and *note*.

Manner of recording evidence outside Presidency-towns.

354. In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

In Italy, the Procedure Code specially provides that witnesses shall be kept outside the Court and brought in one by one. Every precaution must be taken to prevent the witnesses from communicating with one another or with any interested person. Regard being had to their position and the nature of the case, witnesses may refer to notes and memos. The accused or his defenders may question the witnesses through the Court, or directly, with the permission of the Court ; but the Court may forbid any particular question. Witnesses are not permitted to interrogate one another *But they may be confronted, when they disagree on essential points.*—Ital. C. P. C., 301—307. This last is a most useful provision. Witnesses who, after examination, leave the Court without permission are liable to fine.—*Id.*, 308. Witnesses often do this in India, but Magistrates appear to be powerless to punish such acts.

The oath for witnesses in France is to speak without malice or fear, to speak the whole truth, and nothing but the truth.—C. P. C., 317.

It is no ground for excluding the testimony of a witness that he has been present in Court, and heard the testimony of other witnesses. Such a fact goes merely to the credibility of his evidence, but not to its admissibility.—Kyshe's Straits Settlements Reports, iii., 6.

In Germany, the following persons are heard without oath : persons under 16, who owing to defective understanding or weak intelligence,

have not an adequate idea of the nature and importance of an oath; persons convicted of perjury and declared, under Article 161 of the German Penal Code, incapable of taking an oath; persons suspected of having been implicated in the acts which form the subject of inquiry, whether as accomplices, abettors, or harbourers, or who have been condemned as such—Germ. C. P. C., 56. An oath may, under certain circumstances, be taken after the deposition, especially when there have been doubts as to its admissibility. Dumb persons take the oath in writing, or by signs, if they don't know how to write.—*Id.*, 60, 63. One oath suffices for a single case, however often a witness may be recalled.—*Id.*, 66.

Record in summons-cases, and in trials of certain offences by first and second class Magistrates.

355. In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in section 260, clauses (*b*) to (*k*), both inclusive, when tried by a Magistrate of the first or second class, the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same; and such memorandum shall form part of the record.

Record in other cases outside Presidency-towns.

356. In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates) and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court, by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge.

Evidence given in English.

When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

Memorandum when evidence not taken down by the Magistrate or Judge himself.

In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Language of record of evidence.

357. The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record:

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

Option to Magistrate in cases under s. 355.

358. In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in section 357, in the manner provided in the same section.

Mode of recording evidence under section 356 or section 357.

359. Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

The Magistrate or Sessions Judge may in his discretion take down, or cause to be taken down, any particular question and answer.

Procedure in regard to such evidence when completed.

360. As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

If the witness deny the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

If the evidence be taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Interpretation of evidence to accused or his pleader.

361. Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Record of evidence in Presidency Magistrates' Courts.

362. In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees, or imprisonment for a term exceeding six months, he shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may in his

discretion take down, or cause to be taken down, any particular question or answer.

Sentences passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

Remarks respecting demeanour of witness.

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Article 58 of the Louisiana Code of Evidence commences as follows :—" It is the duty of the Judge to prevent any harsh or threatening language from being used towards a witness for the purpose of confusing or intimidating him."

Examination of accused how recorded.

364. Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of the Panjab, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or English ; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused.

In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, unless he is a Presidency Magistrate, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language ; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the

record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

Nothing in this section shall be deemed to apply to the examination of an accused person under section 263.

In some countries an accused is not only a competent witness, but he is *made* to give his own account of the circumstances, and explain away if he can, subject to cross-examination, all that seems suspicious against him. Under certain recent statutes in England (*e. g.*, Employers' Liability and Dynamite Acts) an accused may be sworn, if he chooses, and examined as a witness. See notes under s. 342, *supra*.

In New York, the accused may require the Court to be cleared while his examination is being taken, that is, of all persons except the counsel, clerks, &c.—N. Y. C. P. C., 202.

Article 173 of the Louisiana Penal Code enacts that "the accused must be informed that, although he is at liberty to answer in what manner he may think proper to the questions that shall be put to him, or not to answer them at all, yet a departure from the truth, or a refusal to answer without assigning a sufficient reason, *must operate as a circumstance against him*, as well on the question of commitment as of his guilt or innocence on the trial." See Evidence Act, s. 114 (*b*). Certain interrogatories have to be put to the accused, of which one is the following: "Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts that you think will tend to your exculpation."

It appears that in America a defendant may testify in his own behalf and may be cross-examined in full like any other witness, but he cannot be compelled to testify to facts which would convict him of any other crime than that for which he is on trial.—72 M. E., 431.

Stephen shows from the record of the trial of Sir Thomas Berkeley in 1350, for the murder of Edward II, that at that time the accused was questioned till a specific defence resting on a particular alleged fact was set up by him.—Steph. Hist. Cr. L., i, 148. From the state trials it appears that the Justices acted as police officers and detectives, got up the cases, and were then examined as the principal witnesses.—*Ibid*, i, 223; 6 St. Tr., 619, 572. Stephen remarks: "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which Justices of the Peace, acting frequently the part of detective officers, took their examinations and committed them for trial."

In a case in Scotland it was held that, though the Magistrate fell asleep at intervals for a quarter of an hour at a time, yet the declaration of the prisoner was good; but in a later case, it was held inadmissible where the Magistrate was absent for a quarter of an hour, though he heard the declaration read over before signing it, and declared that it was in substance what the accused had said. Macdonald (2nd Ed.) 257. Such laxities in India would probably result in the degradation of a judicial officer.

In Austria (179, C. P. C.), the accused is invited to answer clearly and truthfully. If he answers with cunning, and either denies the

accusation or affirms to be ignorant of the facts which are charged against him, the Judge must make known to him with "increasing energy," that a lie in presence of the evidence will not avail. Nevertheless, the Judge is not allowed to promise, or to threaten, or to employ forcible means, or any artificial trick, even when well meant, in order to induce him to a confession. The accused cannot, like a witness, be forced to make a quick reply : nevertheless, when through fright or anxiety he loses his presence of mind, and it is evident that this fear results from "internal consciousness of the offence," the Judge must, with "decent earnestness," insist on his stating the truth. The accused is not permitted to advise with his counsel in regard to his answer before replying to questions addressed to him. The President may cause the accused to leave the Court during the examination of a witness or an accomplice, but he must be informed of what is important in the testimony so given.

Record of evidence in High Court.

365. Every High Court established by Royal Charter, and the Chief Court of the Punjab may, from time to time by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed.

CHAPTER XXVI.

OF THE JUDGMENT.

Mode of delivering judgment.

366. The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court either immediately or at some subsequent time of which due notice shall be given to the parties or their pleaders; and the accused shall, if in custody, be brought up, or if not in custody shall be required to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only, in which case it may be pronounced in the presence of his pleader.

Language of judgment.

367. Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court in the language of the Court,

or in English; and shall contain the point or points for determination, the decision thereon, and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.

Contents of judgment.

It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

When the conviction is under the Indian Penal Code, and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

Judgment in alternative.

If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted, and direct that he be set at liberty.

If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall, in its judgment, state the reason why sentence of death was not passed:

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

"The point or points for determination." Questions of a civil nature may arise for determination. In every case of mischief under the Indian Penal Code (425), a question of legal title is involved: see definition of wrongful loss, P. C., 23. German legislators have followed the principle that the Judge of a Criminal Court must decide all questions, of whatever nature, the solution of which can have any influence on the determination of culpability; and such questions may be decided, even though they are pending before a Civil Court. The same principle is followed in all the German States. But the Court may, nevertheless, suspend the criminal case, and fix a time for the parties to file a suit in the Civil Court, and may await the decision of such suit.—Germ. C. P. C., 261. In such case, the Criminal Court may make such use as it thinks fit of the civil judgment, but *it is never bound by it.* It can regard as proved facts, of which the judgment recognizes the existence, and dispense with further proof—*per Daguin and Holtzendorff.* When the accused is convicted, the facts held as proved, which make up the legal elements of the offence, must be set out in an explicit manner. If the judgment merely states that it results from the evidence that the accused is guilty, it may be annulled on revision by the Tribunal of the Empire. T. E., 22nd May 1880, and Germ. C. P. C., 266.

The judgment comprises, then, as in France, two parts, the *dispositif* (*Tenor*), or what is actually decided (=the Indian finding) and the *motifs* (urtheilsgründe), that is, a summary statement of the reasons on which the decision is based. The absence of reasons is a ground of revision.—Germ. C. P. C., 267, 377 (7).

Sentence of death.

Sentence of transportation.

368. When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

No sentence of transportation shall specify the place to which the person sentenced is to be transported.

See Act IX, 1882.

Court not to alter judgment.

369. No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in section 395 or to correct a clerical error.

In Germany, a case terminated by a judgment can be re-opened in favour of the condemned person in the following cases: (1) when any document, produced at the trial to his prejudice, has been found to be forged or falsified; (2) when a witness or expert, who has given evidence to the prejudice of the accused, has intentionally or negligently failed to observe the duties imposed by the oath; (3) when one of the judges, jurors, or assessors shall have failed in his duties in such a manner as to render himself liable to a criminal prosecution; (4) when the criminal judgment is based on a civil judgment, since invalidated by some higher tribunal; (5) when new facts or means of proof are produced, which show either that the accused ought to have been acquitted, or to have been sentenced to a lesser punishment.

Proof of facts is not permitted in order to induce a more or less favourable view of the matter, but only to show that some mistake has been made, as *e.g.*, that the accused was under 18 when he committed the punishable act, and therefore should have been sentenced to a lower punishment.—Germ. C. P. C., 399. Cf. Aust. C. P. C., 353. So a proceeding terminated by a judgment in favour of the accused can, in the converse cases, be re-opened to the prejudice of the accused. This can be done also, when the accused after his acquittal has made a reliable confession concerning the offence.—Germ. C. P. C., 401.

Presidency Magistrate's judgment.

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars:—

(*a*) the serial number of the case;
(*b*) the date of the commission of the offence;
(*c*) the name of the complainant (if any);

(*d*) the name of the accused person, and (except in the case of an European British subject) his parentage and residence;

(*e*) the offence complained of or proved;

(*f*) the plea of the accused and his examination (if any);

(*g*) the final order;

(*h*) the date of such order; and

(*i*) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

Judgment to be explained and copy given to accused.

371. The judgment shall be explained to the accused, and on his application a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost.

In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

Case of person sentenced to death.

When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Judgment when to be translated.

372. The original judgment shall be filed with the record of proceedings, and where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Court of Session to send copy of finding and sentence to District Magistrate.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

Sentence of death to be submitted by Court of Session.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

Power to direct further inquiry to be made or additional evidence to be taken.

375. If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Session.

Such inquiry shall not be made, nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Power of High Court to confirm sentence or annul conviction.

376. In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

(*a*) may confirm the sentence, or pass any other sentence warranted by law, or

(*b*) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(*c*) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Confirmation or new sentence to be signed by two Judges.

377. In every case so submitted, the confirmation of the sentence or any new sentence or order passed by the High Court shall, when such Court consists of two or

more Judges, be made, passed, and signed by at least two of them.

Procedure in case of difference of opinion.

378. When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such examination and hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure in cases submitted to High Court for confirmation.

379. In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court, and attested with his official signature, to the Court of Session.

Confirmation of sentence of Assistant Sessions Judge or Magistrate acting under section 34.

380. When a sentence passed by an Assistant Sessions Judge or by a District Magistrate acting under section 34 is submitted to a Sessions Judge for confirmation, such Sessions Judge

(*a*) may confirm the sentence, or pass any other sentence which the lower Court might have passed ; or

(*b*) may annul the conviction, and convict the accused of any offence of which the lower Court might have convicted him, or order a new trial on the same or an amended charge ; or

(*c*) may acquit the accused ; or

(*d*) if he thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

Unless the Court of Sessions otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or evidence taken ; and, when the sentence has been submitted by an Assistant Sessions Judge, such inquiry shall not be made, nor shall such evidence be taken, in the presence of jurors or assessors.

When the inquiry and the evidence (if any) are not made and taken by the Court of Sessions, the result of such inquiry and the evidence shall be certified to such Court.

CHAPTER XXVIII.

OF EXECUTION.

Execution of order passed under section 376.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Postponement of capital sentence on pregnant woman.

382. If a woman sentenced to death be found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may commute the sentence to transportation for life.

Execution of sentences of transportation or imprisonment in other cases.

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

In Germany, the execution of punishment may be suspended for four weeks (or, with the consent of the Sovereign, four months) on the request of the condemned person, if its immediate execution would entail on him or his family considerable injury and more than was contemplated by the condemnation.—Germ. C. P. C., 488.

Direction of warrant for execution.

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be confined.

In Italy, any jailor who receives or keeps any person in the jail except under the *mandat d'arrêt*, or an order of remand, or a sentence of imprisonment, or some heavier punishment, or a written order of competent authority, is liable to imprisonment or to deprivation of office.—Ital. C. P. C., 809; P. C., 198.

In France, there are besides the prisons for convicted offenders, *maisons d'arrêts* in each arrondissement near the Courts of first instance for prisoners under trial, and *maisons de justice* for the custody of those who are to be tried by the Court of Assize.—C. P. C., 603.

Warrant with whom to be lodged.

385. When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

Warrant for levy of fine.

386. Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned.

In England, if the defendant has not sufficient goods to be distrained, *or if the distress would be ruinous to his family*, then, in lieu of distress, the Justice may commit the defendant to prison.—11 & 12 Vict., c. 43, s. 20.

If a fine prove to be irrecoverable, and the Court has omitted to impose any imprisonment in default, such imprisonment may be subsequently imposed.—Germ. C. P. C., 491, and P. C., 24, 28.

Effect of such warrant.

387. Such warrant may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the distress and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

Suspension of execution of sentence of imprisonment.

388. When an offender has been sentenced to fine only, and to imprisonment in default of payment of the fine, and the Court issues a warrant under section 386, it may suspend the execution of the sentence of imprisonment and may release the offender on his executing a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before such Court on the day appointed for the return to such warrant, such day not being more than fifteen days from the time of executing the bond; and, in the event of the fine not having been realized, the Court may direct the sentence of imprisonment to be carried into execution at once.

In Italy, imprisonment can be given in default of payment of fine even when there is no mention of it in the sentence. The

scale of imprisonment in default is one day for every three francs, up to a maximum of two years. In default of payment of compensation, one day's detention can be given for every two francs up to a maximum of 15 days.—Ital. C. P. C., 594; P. C., 67.

In Austria when, by the immediate execution of a sentence depriving the convict of liberty not extending beyond six months, the means of subsistence of the guiltless family would be destroyed, it can be deferred for a time, if there is no fear of his escape. The suspension is granted by the superior courts.

Who may issue warrant.

389. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence or by the successor in office.

Execution of sentence of whipping only.

390. When the accused is sentenced to whipping only, the sentence shall be executed at such place and time as the Court may direct.

The law does not state who is to inflict the whipping. The duty is a very disagreeable one, and it is harsh and illegal to order a chaprassie to inflict the whipping under pain of dismissal. Under 10 & 11 Vict., c. 82, a constable is bound to obey an order of the Justices to whip boys out of prison. Some provision is required in India, or the sentence should be carried out at the jail. It is not desirable to have a man whipped before crowds of spectators.

Execution of sentence of whipping, in addition to imprisonment.

391. When the accused is sentenced to whipping in addition to imprisonment in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal be made within that time, until the sentence is confirmed by the Appellate Court: but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

Mode of inflicting punishment.

392. In the case of a person of or over sixteen years of age, whipping shall be inflicted with a light ratan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under sixteen years

of age, it shall be inflicted in the way of school-discipline with a light ratan.

Limit of number of stripes.

In no case shall such punishment exceed thirty stripes.

393. No sentence of whipping shall be executed by instalments; and none of the following persons shall be punishable with whipping (namely):—

Not to be executed by instalments.

Exemptions.

(*a*) females;

(*b*) males sentenced to death, or to transportation, or to penal servitude, or to imprisonment for more than five years;

(*c*) males whom the Court considers to be more than forty-five years of age.

The whipping of females in England was not wholly abolished till 1820, 1 Geo. IV, c. 57, s. 1. There is, however, one offence for which an offender may be whipped, whether male or female—and that is the pointing firearms or throwing offensive materials at the sovereign.—5 & 6 Vict., c. 38, s. 2. In Denmark the only females who can be whipped are girls from ten to twelve years of age.—Den. P. C., 29.

In China, female offenders cannot be sent to prison except in capital cases, or cases of adultery. In all other cases, they shall, if married, remain in the charge and custody of their husbands, and if single, in that of their relations, or next neighbours, who shall, upon every such occasion, be held responsible for their appearance at the tribunal of justice, when required.—Chinese P. C., 420.

394. The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

Whipping not to be inflicted if offender not in fit state of health.

If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

Stay of execution.

395. In any case in which, under section 394, a sentence of whipping is, wholly or partially, prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or

Procedure if punishment cannot be inflicted under section 394.

in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

Execution of sentences on escaped convicts.

396. When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping shall, subject to the provisions hereinbefore contained, take effect immediately, and if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say:—

If the new sentence is severer in its quality than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

When the new sentence is not severer in its quality than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

EXPLANATION.—For the purposes of this section—

(*a*) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment;

(*b*) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(*c*) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

Sentence on offender already sentenced for another offence.

397. When a person already undergoing a sentence of imprisonment, penal servitude, or transportation, is sentenced to imprisonment, penal servitude, or transportation, such imprisonment, penal servitude, or transportation, shall commence at the expiration of the imprisonment, penal servitude, or transportation to which he has been previously sentenced:

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction be one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced.

Provisions supplemental to sections 35, 396, and 397.

398. (1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is, after its execution, to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

As amended by Act X, 1886, s. 10.

Confinement of youthful offenders in reformatories.

399. When any person under the age of sixteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry, or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

All persons confined under this section shall be subject to the rules so prescribed.

Return of warrant on execution of sentence.

400. When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS, AND COMMUTATIONS OF SENTENCES.

Power to suspend or remit sentences.

401. When any person has been sentenced to punishment for an offence, the Governor-General in Council, or the Local Government, may, at any time, without conditions, or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

Whenever an application is made to the Governor-General in Council or the Local Government for the suspension or remission of a sentence, the Governor-General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion.

If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor-General in Council or of the Local Government, as the case may be, not fulfilled, the Governor-General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by a Police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

Nothing herein contained shall be deemed to interfere with the right of Her Majesty to grant pardons, reprieves, respites or remissions of punishment.

As amended by Act X of 1886, s. 11.

Power to commute punishment.

402. The Governor-General in Council, or the Local Government, may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it :—

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

See s. 55, Penal Code.

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

Person once convicted or acquitted not to be tried for same offence.

403. A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, paragraph 1.

A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

EXPLANATION.—The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section.

Illustrations.

(*a*.) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or upon the same facts, with theft simply, or with criminal breach of trust.

(*b.*) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(*c.*) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(*d.*) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(*e.*) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph three of this section.

(*f.*) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(*g.*) A, B, and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B, and C may afterwards be charged with, and tried for, dacoity on the same facts.

"Same offence" means not the same *eo nomine*, but the same criminal act or omission. A conviction of "swindling" is a good bar to a prosecution for "uttering a forged instrument."—11 Tex. App., 207. Defendant was indicted for unlawfully disturbing a religious assembly. The disturbance consisted in firing a pistol. He was convicted and sentenced, and afterwards indicted for an attempt to commit murder by shooting at another with a pistol. The shooting was the same for which he had previously been convicted. *Held*, that this fact constituted no bar to the second indictment.—4 Lea (Tenn.), 442.

Ruled, in Indiana, that in a plea of former conviction, the burden of proof is on the defendant to shew the identity of the offences—78 Ind., 133. In a criminal prosecution for assault and battery, the defendant pleaded a former conviction and offered in evidence a record which showed that, on the day of the assault, he complained of himself on oath before a Justice, for the same offence; was ordered by the Justice to consider himself under arrest without a warrant; that he then testified to the assault, pleaded guilty, and paid the fine imposed. *Held*, that the plea should be over-ruled, as the proceedings showed fraud on their face.—28 Minn., 66; 80 Ind., 586.

A plea of former acquittal is good if it shows an indictment, trial, and acquittal in a Court of competent jurisdiction for the same crime charged in the case at bar.—81 Ind., 128.

In *R.* v. *Barrett*, a case tried at Gloucester Spring Assizes in 1851, Patteson, and Talfourd, JJ., held that a previous summary conviction for assault under 9 Geo. IV, s. 31 (then unrepealed), was no bar to an indictment for manslaughter; and in *R.* v. *Norris* (L. R., 1 C. C. R., 90) it was held by four judges out of five that a summary conviction for assault does not, under 24 and 25 Vict., c. 100, s. 45, bar an indictment for manslaughter. By the common law, *autrefois acquit* or *convict* of a misdemeanour could never be pleaded to an indictment for felony.—1 Russ. Cri. and Mis., p. 838. But in *R.* v. *Walker* and *R.* v. *Stanton* a plea of *autrefois convict* of an assault before justices, under 9 Geo. IV, c. 31, was held to be, by the statute, a bar to an indictment for felonious stabbing.

In order to prove a plea of *autrefois convict*, the defendant must show that he was previously convicted, either of the offence charged

in the indictment to which the plea is pleaded, or of an offence of which he might be convicted on that indictment, and such proof is not made out by proof that the defendant was convicted on an indictment set aside on writ of error. Similarly as to the plea of *autrefois acquit*.—Steph. Dig., C. P. C., 265. See cases collected in Archbold, 141, 142.

In France, a person, legally acquitted by the Court of Assize, cannot again be prosecuted in respect of the same facts.—C. P. C., 360. An accused, acquitted of infanticide, can, in respect of the very same fact, be prosecuted in the correctional Court for causing death by a rash act (homicide par imprudence). Cass., 9th June 1854; and that, although the Court of Assize has refused to put the subsidiary question to the jury.—Cass., 18th April 1857.

By 24 and 25 Vict., c. 97, s. 35, and *ib.*, c. 100, it is enacted that any person who unlawfully and maliciously throws any wood, &c., upon any railway with intent to endanger the safety of any passenger, &c., shall be guilty of felony: *Held*, that an acquittal upon an indictment charging the prisoner with a felony was no bar to a subsequent indictment being preferred *upon the same facts* for a misdemeanour under the provisions of the above statutes.—*Reg.* v. *Gilmore*, 15 Cox, C. C., 85.

In New York, a plea of former acquittal can be put in only in the case of an acquittal *on the merits*. Section 360 of the New York Procedure Code enacts that "when the defendant shall have been convicted or acquitted, upon an indictment for an offence consisting of different degrees, the conviction or acquittal is a bar to another indictment for the offence charged in the former, *or for any inferior degree of that offence*, or for an attempt to commit the same, or *for an offence necessarily included therein*, of which he might have been convicted under that indictment." Under this section an acquittal for theft would be no bar to a prosecution for dacoity.

PART VII.

OF APPEAL, REFERENCE, AND REVISION.

CHAPTER XXXI.

OF APPEALS.

Unless otherwise provided, no appeal to lie.

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

It is contrary to the policy of the English law that there should be an appeal in cases of felony.—*Edulyee Byramjee, Ex parte*, 5 Moore, P. C., 276. See also *R.* v. *Alloo Paroo*, I. A., I. 310. In the case of *R.* v. *Joykisson Mookerjee*, the Privy Council refused to entertain an appeal from Calcutta, but at the same time they held they had the

power to do so. See section 41 of the Letters Patent of 1865, I. A., I. 860. The Judicial Committee assumed that there exists on behalf of the Crown a prerogative right of appeal even in matters of criminal jurisdiction, but that such appeals in criminal cases would maim the course of justice. They thought justice had not been done in the case, and advised that an application should be made to the constituted executive authorities, who have the power to afford a remedy. The 17 and 18 Vict., c. 125, s. 35, 1854, which gives an appeal on motions for new trials, does not apply to indictments—*Reg.* v. *Stephens*, 7 B. & S., 710. This ruling was before the Judicature Acts. Under the Judicature Acts, 1873 and 1875, there is no appeal to the Court of Appeal in a criminal case except for error on the record.—*Reg.* v. *Steel*, 2 Q. B. D., 37.

In Germany, an appeal lies from the Courts of first instance to the Criminal Chamber of the District Tribunal, *and the appellate decision is final.* There can be no further revision of it. This very salutary rule should be adopted in India. The appellate decisions of District Magistrates and Sessions Judges should not be liable to revision by the High Court. Except as above, there is no appeal in Germany. In other cases, there may be revision. See notes under s. 439, C. P. C. *Where an appeal lies, there is no revision.* A party can neither go to the Court of Revision in the first instance, without going to the Appellate Court, nor, when the appellate decision is against him, has he any further remedy in the Court of Revision.—Germ. C. P. C., Bk. iii., sec. 3.

It is still a keenly-debated point in Germany whether there should be any appeal in criminal matters. Most States had rejected the principle, while some few thought a distinction should be drawn between the question of culpability and that of the application of punishment, and that the power of appealing should be limited to the latter question. This mixed system has been adopted in Austria. Aust. C. P. C., 283. The framers of the German Code were of opinion that a double jurisdiction was quite incompatible with the system of hearing the witnesses orally, and absolutely suppressed the appeal. Very strong arguments were put forward in favour of the abolition of appeal, but the Committee of the Reichstag decided, by 14 to 13 voices, that there should be an appeal against the decisions of the Lowest Courts and those of the District Tribunals. On a second reading, however, it was decided that there should be an appeal against the former Courts only, and the reason why appeal was retained is given in the report. It appears that these Courts contain a non-judicial element, being composed of a member of the judicial service and of two lay assessors, and that there is no preliminary inquiry in cases tried by them. Moreover, they consist of three members only, while the Criminal Chambers of the District Tribunals consist of five.

The accused can only object to those parts of a decision which are unfavourable to him, and he cannot take exception to the reasons for the decision without objecting to the decision itself. The appeal must be instituted within a week before the Court whose decision is attacked, and the Appellate Court can only examine the original decision, *quoad* the points attacked.—Germ. C. P. C., 355, 359, 368. Not only the accused, but the public minister may appeal. The Appellate Court may hear the witnesses again or take additional evidence; and, as a

matter of practice, they are generally heard again, as the mere reading of their depositions constitutes a departure from the principle laid down in Article 249 that the Court must hear the witnesses *vivâ voce*. It is supposed to be dangerous to upset the decision of a Lower Court on a question of fact without actually hearing the witnesses who have deposed to such fact. It is a pity that this principle is not recognized and acted up to in India.—*Id.*, 364, 366, and Commentary of M. Daguin.

In Austria, there is an appeal from a judgment of acquittal as well as from a conviction. Appeal can be made not only by the condemned person but by the public prosecutor; the complainant; the husband or wife; by ascendants or descendants in a direct line; by the guardian of the condemned; lastly, by the heirs of the complainant. Appeal must be made within 24 hours from judgment, and the grounds of appeal must be given within eight days.

Appeal from order rejecting application for restoration of attached property.

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court, may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Appeal from order requiring security for good behaviour.

406. Any person required by a Magistrate, other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour under section 118, may appeal to the District Magistrate.

Appeal from sentence of Magistrate of the second or third class.

407. Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 by a Subdivisional Magistrate of the second class, may appeal to the District Magistrate.

Transfer of appeals to first class Magistrate.

The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him, and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals shall be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, shall be transferred to such Subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

The right of appeal in France belongs: (1) to the accused or responsible party; (2) to the civil party, *quoad* his civil interests only; (3)

to the forest administration in the case of forest offences; (4) to the Procureur of the Republic (Courts of first instance); (5) to the Procureur-Général (Courts of Appeal).

In France, an accused convicted by a Police Court may appeal to the Correctional Court within ten days, when the fine exceeds five francs (exclusive of costs).—C. P. C., 172. The public minister, the civil party, and the accused may all go to the Court of Cassation (Revision) against the original or the appellate judgment.—*Id.*, 177. An appeal from the judgments of Correctional Courts lies to the Court of Appeal.—*Id.*, 201.

Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class.

408. Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under section 349 by a Magistrate of the first class, may appeal to the Court of Session:

Provided as follows:—

(*a*) when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such case shall lie to the High Court, but shall not be presented until the case has been disposed of by the Court of Session;

(*b*) any European British subject so convicted may at his option appeal either to the High Court or the Court of Session.

Appeals to Court of Session how heard.

409. An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional or Joint Sessions Judge.

Appeal from sentence of Court of Session.

410. Any person convicted on a trial held by a Sessions Judge, or an Additional or a Joint Sessions Judge, may appeal to the High Court.

There is no regular appeal against the sentence of a Court of Assize in France; but a recourse to *cassation* is allowed. Cassation is only admissible when a formality is not observed which the law prescribes *as essential*, or when an express direction of the law is violated. It decides on the point of law alone, never on points of fact.

Appeal from sentence of Presidency Magistrate.

411. Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court if the Magistrate has sentenced him to imprisonment for a term

exceeding six months or to fine exceeding two hundred rupees.

No appeal in certain cases when accused pleads guilty.

412. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or a Presidency Magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence.

No appeal in petty cases.

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only.

EXPLANATION.—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has been passed.

No appeal from certain summary convictions.

414. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only.

Proviso to sections 413 and 414.

415. An appeal may be brought against any sentence referred to in section 413 or section 414, by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

EXPLANATION.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

Saving of sentences on European British subjects.

416. Nothing in sections 413 and 414 applies to appeals from sentences passed under Chapter XXXIII on European British subjects.

Appeal on behalf of Government in case of acquittal.

417. The Local Government may direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

This section prescribes one mode of appealing against an acquittal. It is no where stated that this is *the only* remedy in case of acquittal. In Louisiana, after acquittal, new trials may be granted on the motion of the public prosecutor in the following cases :—

1. When the defendant has bribed a juror or witness, or has given any forged paper in evidence, which might, in the opinion of the Court, have changed the verdict.

2. When the defendant has prevented any material witness from appearing against him; or has destroyed or secreted any written document, material to the prosecution, and which might otherwise have been produced.

3. *When evidence in favour of the accused shall have been given to the jury out of Court.*

4. When, by the procurement of the defendant, the jury was illegally impannelled.

It would appear from the New York Code that an appeal against an acquittal is allowed only upon a judgment for the defendant, on a demurrer to the indictment, or upon an order of the Court, arresting the judgment.—N. Y. C. P. C., 579.

Appeal on what matters admissible.

418. An appeal may lie on a matter of fact, as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

EXPLANATION.—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

In England, the Court will not, under 11 and 12 Vict., c. 43, s. 35, entertain an appeal from the decision of a Magistrate touching a question of fact. In a case where the Magistrate had, upon the 5th rule of 18 & 19 Vict., c. 122, s. 26, decided that a row of houses, forming part of a line of thoroughfare, was a street, the Judges declined to interfere with his decision.—*Newman* v. *Baker*, 8 C. B., N. S., 200; *R.* v. *Yeomans*, 1 L. T., N. S., 369. As to fact, the Court above will not interfere where it sees any evidence upon which the Justices could have proceeded.—*Cornwall* v. *Sanders*, 3 B. & S., 206. See *R.* v. *Dunn*, 3 Jur., N. S., 341 (Q. B.). Too rigid a rule could not be made in India, but it is probable that Appellate Courts often upset findings of fact on insufficient grounds.

Petition of appeal.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is pre-

sented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

In some districts there are men hanging about the Courts (not always mukhtars), who incite convicted prisoners or their relatives and friends to appeal, promising to procure the release of the former. In China, "all officers, official attendants and jailors, belonging to prisons, who instruct or encourage prisoners to appeal against their sentence under frivolous pretexts, after their just and lawful condemnation; or who assist them in communicating with others out of prison for the same purpose, are liable to punishment."—Chinese P. C., 400.

Procedure when appellant in jail.

420. If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

Summary rejection of appeal.

421. On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may reject the appeal summarily: Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

Before rejecting an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

Notice of appeal.

422. If the Appellate Court does not reject the appeal summarily, it shall cause notice to be given to the appellant or his pleader and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under section 417, the Appellate Court shall cause a like notice to be given to the accused.

Powers of Appellate Court in disposing of appeal.

423. The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appel-

lant or his pleader, if he appears, and the public prosecutor, if he appears, and, in case of an appeal under section 417, the accused, if he appears, the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal, or may—

(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(*b*) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court, or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or (3) with or without such reduction, and with or without altering the finding, alter the nature of the sentence, but not so as to enhance the same;

(*c*) in an appeal from any other order, alter or reverse such order;

(*d*) nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

Held, in Texas, that the doctrine of reasonable doubt applies only to criminative and not to exculpatory facts.—13 Tex. App., 402. An accused must prove and make good matters of special defence. An erroneous charge, which clearly could have done no harm, affords no ground for reversal.—59 California, 601. *Held*, in America, that new evidence simply tending to impeach witnesses is no ground for a new trial.—67 Ga., 570; 13 Neb., 436; 34 Louis., 346. Where the evidence upon a criminal trial is conflicting, and there is testimony to support the verdict, it will not be disturbed.—12 Tex. App., 156. Upon a criminal trial in Louisiana, the Judge ordered the witnesses to be sequestered. One of defendant's witnesses was not in Court when the order was made, and had no knowledge of the order, and passed the night in the same house with one of the defendants. Affidavit was made that no conversation took place upon the subject of the trial. *Held*, that the exclusion of the testimony of this witness afforded ground for a new trial.—33 La. An., 737.

"That the accused be re-tried or committed for trial." When the Appellate Court orders commitment, it appears that the Magistrate may commit on the record as it stands, merely following out the procedure of ss. 210, 211, 213, *supra*. As to a re-trial, it is probable that

the evidence of the witnesses may be read over to them, the accused being asked if he wishes to cross-examine further.—See note under 282, *supra*.

With regard to the disposal of appeals, s. 603 of the New York Procedure Code enacts that, "after hearing the appeal, the Court must give judgment, *without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.*"—N. Y. C. P. C., 603.

The words of ss. 535, 537, *infra*, should be posted up in large letters in every Appellate and Revisional Court in India.

In Germany, the procedure on appeal is as ollows :—A statement of the whole case is made by a member of the Appellate Court (which consists of five). Witnesses are heard, and the accused is interrogated. If witnesses and experts have been cited to appear, then depositions cannot be read without the consent of both the public minister and the accused, unless they are unable to appear or, if they cannot remember some fact they have previously deposed, or their deposition is in some point inconsistent with their former deposition.—Germ. C. P. C., 366. See also Articles 250, 252. The public minister and the accused or his defender are then heard.—*Id.*, 367. If the judgment of the Lower Court contains such errors as would be a ground for revision (Article 377.—See notes under s. 439), the Appellate Court may send the case back, but cannot upset the decision. If the Lower Court had no jurisdiction, the Appellate Court must send the case to a competent Court, or can retain the case on its own file and dispose of it if it happens to be the competent Court of first instance.—*Id.*, 369.

"But not so as to enhance the same." In Germany, when a decision is attacked solely by the accused, or in his interests, by the public minister, the sentence cannot be enhanced.—Germ. C. P. C., 372. A modification of the sentence to the prejudice of the accused is known among criminal jurists as a *reformatio in pejus*, and the principle of not allowing such a modification has been recognized by recent legislation in several countries.—Cf. Aust. C. P. C., 295 (2). But it should be borne in mind that in Germany the public minister can appeal as well as the accused, and, when he is the appellant, the sentence can of course be enhanced.

A Magistrate's decision should not be reversed on the ground of its being against the weight of evidence, unless it be grossly so. Kyshe, Straits Settlements Rep., iii., 108. In this case Wood, J., said : "An appeal against the decision of a Magistrate on matters of fact should not be lightly allowed—not unless the decision is grossly against the weight of evidence. Here it is impossible to say how the demeanour of the witnesses might have told against them. *This Court is no better judge of fact than any other.*"

Judgments of subordinate Appellate Courts.

424. The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court :

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up or required to attend, to hear judgment delivered.

Order by High Court on appeal to be certified to lower Court.

425. Whenever a case is decided on appeal by the High Court under this chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court; and, if necessary, the record shall be amended in accordance therewith.

Suspension of sentence pending appeal.

Release of appellant on bail.

426. Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, if he is in confinement, that he be released on bail or on his own bond.

The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

Arrest of accused in appeal from acquittal.

427. When an appeal is presented under section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

Appellate Court may take further evidence or direct it to be taken.

428. In dealing with any appeal under this chapter, the Appellate Court, if it thinks additional evidence to be necessary, may either take such evidence itself, or

direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

The taking of evidence under this section shall, for the purposes of Chapter XXV, be deemed to be an inquiry.

Procedure where Judges of Court of appeal are equally divided.

429. When the Judges composing the Court of appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such examination and such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Finality of orders on appeal.

430. Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII.

See note under s. 421.

Abatement of appeals.

431. Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this chapter shall finally abate on the death of the appellant.

CHAPTER XXXII.

OF REFERENCE AND REVISION.

Reference by Presidency Magistrate to High Court.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference; and, pending such decision, may either commit the accused to

jail, or release him on bail to appear for judgment when called upon.

Disposal of case according to decision of High Court.

433. When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Direction as to costs.

The High Court may direct by whom the costs of such reference shall be paid.

Power to reserve questions arising in original jurisdiction of High Court.

434. When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

Procedure when question reserved.

If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail, and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.

Power to call for records of inferior Courts.

435. The High Court or any Court of Session, or District Magistrate, or any Subdivisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction, for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

If any Subdivisional Magistrate acting under this section considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irre-

gular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

Orders made under sections 143 and 144 and proceedings under section 176 are not proceedings within the meaning of this section.

In France, there can be no demand for revision before the Court of Cassation against orders which have not the character of a judicial judgment or decree—Cass., 18th January 1867; Cass., 27th February 1863. Again, the Court of Cassation has no power to interfere with any interlocutory order, but only with final judgments, original or appellate—Cass., 10th August 1844. If there has been an omission or violation of any of the formalities which the law considers as *absolutely essential* (que le présent Code prescrit sous peine de nullité), that is a ground for a reversal of the conviction and of what has gone before, *starting from the oldest informal act*—C. P. C., 408. But in India a conviction is sometimes upset altogether owing to some slight informality, and the accused is not re-tried. The Court of Cassation has no jurisdiction to notice any flaws in the procedure prior to the actual commencement of the trial (des actes antérieurs à l'arrêt de renvoi et de mise en accusation)—Cass., 7th December 1865. The same principle applied to India would mean that the High Court could not entertain any application finding fault with the preliminary investigation (police or magisterial), or with the procedure of the Magistrate putting the accused on his trial. I take it this is the intention of the Indian Legislature. It is no ground for revision that punishment has been awarded under a wrong section, if the same punishment could have been awarded under another section—C. P. C., 411; Cass., 16th December 1864, *et passim*. If the accused is acquitted, the public minister can apply to have the proceedings quashed in the interests of the law, but without prejudice to the accused—C. P. C., 409. So when the accused has been acquitted on the ground that the act committed does not constitute an offence under the law—*Id.*, 410. Finally (and these rulings are as numerous as they are important), no objections can be taken on revisional proceedings, which have not been taken before the Court of Appeal—Cass., 11th September 1812, *et passim* up to 12th August 1864.

In England, the defence of Justices whose decision has been impugned is now facilitated by the review of Justices' Decision Act, 1872 (35 and 36 Vict., c. 26, s. 2), which enacts that whenever the decision of any Justice, &c., *is called in question in any superior Court of common law* by a rule to show cause, or other process issued upon an *ex parte* application, it is lawful for any such Justice to make and file in such Court an affidavit setting forth the grounds of the decision so brought under review, and any facts which he may consider to have a material bearing on the question at issue; and such affidavit may be forwarded by post to one of the Masters of the Court for the purpose of being so filed. Such affidavit requires neither fee nor stamp. See s. 441, which ought to be made applicable to all Magistrates.

Under s. 33 of the Summary Jurisdiction Act, 1879, "any person aggrieved who desires to question a conviction, order or other proceeding of a Court of Summary Jurisdiction, on the ground that

it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case, setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated.

Power to order commitment.

436. When on examining the record of any case under section 435 or otherwise, the Court of Session or District Magistrate considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the Court of Session or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Court of Session or District Magistrate, improperly discharged:

Provided as follows—

(*a*) that the accused has had an opportunity of showing cause to such Court or Magistrate why the commitment should not be made:

(*b*) that, if such Court or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Court or Magistrate may direct the inferior Court to inquire into such offence.

Power to order inquiry.

437. On examining any record, under section 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203, *or into the case of any accused person who has been discharged.*

Report to High Court.

438. The Court of Session or District Magistrate may, if it or he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the results of such examination, and, when such report contains a recommendation that a sentence be reversed, may order that the execution of such sentence be suspended, and if the accused is in confinement, that he be released on bail or on his own bond.

The demand for revision must be made to the Court whose decision is attacked within a week.—Germ. C. P. C., 381. Reasons for attacking the decision must be specifically stated: if the application merely states generally that accused has been wrongly condemned, it will be at once rejected.—*Id.*, 384; T. E., 8th Dec. 1879. The petition for revision, if admitted, must be given to the opposite party, who may give a reply in writing within a week. This is all done before the Court, whose decision is attacked, and then the record is sent to the Court for revision.—*Id.*, 387. These are very salutary rules, which the Indian legislature should lose no time in adopting. The hearing commences by an exposition of the case *by one of the members of the Court of Revision*, who is chosen by the President, and the accused (or his defender) and the public minister are heard. This is as if the case were prepared by one of the High Court Judges in India.—*Id.*, 391. What a contrast does this present to the practice in Calcutta, where Mr. Ghose or Mr. Bose gets up and makes an *ex parte* statement, which may positively bristle with inaccuracies and misrepresentations, and then the rule is made absolute, often without the Magistrate being heard in support of his own decision.

A decision on revision may be partially upset and partially upheld; and if the only violation of law has been a violation of rules of procedure, the decision need not be reversed, but the Court confines itself to directing the regular performance of the omitted procedure.—Germ. C. P. C., 393, and Commentaries of MM. Daguin and Hahn.

The Court of Revision cannot search for new evidence. It must hold as proved the facts which the Lower Court has found to exist.—*Id.*, 394. Where the application of the minimum punishments depends by law on extenuating circumstances, the Court of Revision cannot itself apply the punishment unless the Lower Court has found the existence of such circumstances.—T. E., 19th Oct. 1880.

As has been remarked above, the French Court of Cassation is bound, after reversing a decision, to send the case back for re-trial.—Fr. C. P. C., 427. But it is not bound to do so if the *cassation* has been pronounced because the punishment was prescribed, or the offence covered by an amnesty, or the act prosecuted did not amount to an offence under any penal law. It is, moreover, bound to send the case back to a Court other than that which has already tried it. This is a principle which has been utterly rejected by the German Legislature. In the Reichstag it was proposed that the Court of Revision should be given power, for special reasons, to send the case back to the same Court *or to another Court*. This amendment was keenly opposed by M. Hanauer, who pointed out that the practice in Germany would be justly opened to criticism, if the Lower Court were not bound (as they are not bound in France) to accept the law as laid down by the Court of Revision; but that, as a matter of fact, it was not likely to lead to any harm or inconvenience in view of the provisions of Article 319 (Article 398 of the Code as passed), which enact that the Lower Court, to which the case is sent for re-trial, must accept as the base of its decision the legal solution, by which the first decision has been annulled. The amendment was, however, carried, but not by a large majority. Cases are, however, *ordinarily* sent back to the same Court. The Austrian Code (288) resembles the German Code in giving a choice between the Court, which has heard the case or another Court of the same degree.

High Court's powers of revision.

439. In the case of any proceeding, the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by sections 195, 423, 426, 427, and 428, or on a Court by section 338, and may enhance the sentence, and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

In Italy, illegalities or irregularities, not urged before the Court of Appeal, cannot be urged before the Court of Revision (Cassation).—Ital. C. P. C., 420.

"Or which otherwise comes to its knowledge."—With the exception of the public minister, those who have recourse to Cassation (Revision) in Italy must deposit a sum of money, larger or smaller according to the Tribunal by which the order has been passed, and, if the application be rejected, this sum is forfeited to the State. But those who have been condemned to severe punishments, or who can properly establish their poverty, are exempted from the deposit—Ital. C. P. C., 656. Another excellent provision of the Italian Code is that those who apply for revision must state *before the Court which passed judgment* the grounds on which the application is made; they must indicate precisely the formalities which have been omitted, and the articles of the law which have been violated. The application is made to the Original Court—*Id.*, 659. When a judgment is upset, and a re-trial ordered either from the commencement or from the last illegal act, the case is generally sent to a different Court. If only part of a judgment is illegal, only that part is annulled An accused who applies for revision cannot be sentenced to a heavier punishment either in kind or duration. If the sentence is annulled merely owing to omission of essential forms of procedure, the accused can elect either to be tried again or to undergo the original sentence, although annulled.—Ital. C. P. C., 685.

The High Court will not interfere until the remedy of appeal has been exhausted.—*Empress* v. *Mary Donelly*, I. L. R., 2 Cal., 40. In England, the Court will not grant a *mandamus* where there is by statute an appeal to quarter sessions—as *e. g.*, to compel Justices to re-hear an application for a beer license—*R.* v. *Smith*, &c., (*Justices*), 21 W. R., 382; *R.* v. *Oxfordshire Justices*, 18 L. J., M. C., 222.

It is often erroneously supposed that in England there is no remedy or appeal whatever in case of an acquittal. In *Davys* v *Douglas*, 32 L. J., Ex., 283, it was decided that Justices have power to state a case in the event of an acquittal as well as of a conviction. When the acquittal is on a point of law or construction, the prosecutor can claim to have a case stated.

In France, the counsel of the accused in the Court of Assize can, as such, make an application for revision (un pourvoi en cassation)—Cass., 1st December 1854; and even an advocate who has represented the civil party in the correctional Court can do so—Cass., 23rd August 1851. It is an excellent rule that there is no revision against interlocutory and preliminary orders of procedure (arrêts preparatoires et d' instruction). An applicant for revision, if the civil party, or the public minister, must notify the fact of application to the accused within three days.—C. P. C., 418.

When the Court of Cassation quashes an order or judgment of a correctional or police tribunal, it *must* send the record and the parties before a Court of the same kind (qualité) as that which has passed the order quashed—C. P. C., 427. But the Court of Cassation has ruled that it may quash without sending the case back, *if there remains nothing* for the decision of the Lower Court—Cass., 12th August 1865; as for instance when the judgment is quashed on the ground that it rests on a decision since overruled, and therefore has no legal basis—Cass., 29th July 1864. When the Court quashes a judgment passed at a regular trial (en matière criminelle), it sends the case to another Court of Assize, if the judgment and procedure are quashed on account of errors committed in the original Court of Assize. If the judgment has been passed by an incompetent Court, the record is to be sent to a competent Court for disposal—C. P. C., 429. When an application for revision is once rejected, it cannot be renewed by any means or on any pretext whatever—*Id.*, 438. In India, High Courts sometimes quash convictions on technical grounds without ordering re-trial. In a case in which a Deputy Magistrate convicted of rioting, the Sessions Judge upheld the order, as the accused knew the case they had to meet, *and had been defended by four pleaders.* Norris, J., quashed the conviction *on revision* on the ground that the common object was not set forth with sufficient clearness in the charge. He omitted to order a re-trial, though, quite apart from the rioting, other offences had been committed. No failure of justice was shown, and Norris, J., appears to have overlooked the provisions of ss. 535, 537, *infra.*

The fact that the High Court has released a prisoner under this section does not prevent the Magistrate from again arresting him and trying him for some other offence. But the second arrest must not be substantially for the same cause as the first. See *Att.-Gen. of Hong-kong* v. *Kwok-a-Sing*, 42 L. J., P. C., 64.

The jurisdiction of the Court of Crown Cases Reserved in England may be exercised by any five or more Judges of the High Court;

provided that the Lord Chief Justice shall always be one, unless prevented by illness or otherwise, 44 and 45 Vict., c. 68, s. 15.

Besides the *cassation* in France, there is a particular *révision*. This is demanded in three cases: (1) when two persons have been separately convicted of the same crime, and the sentences are irreconcilable. The two contradictory sentences are transmitted by the Minister of Justice to the *Procureur-Général* of the Court of Cassation. The *Chambre Criminelle* of this Court, after having verified the incompatibility of the two condemnations, annuls the two sentences, and sends the accused before some Court other than those which pronounced the sentences; (2) when, after a conviction of some person for homicide, sufficient indications are found of the existence of the supposed victim; (3) when, after the condemnation of an accused person, one or more witnesses against him are found to have borne false testimony.

The revision of the German Code corresponds to the *recours en cassation* of the French Code. Four conditions are required for the annulment of a judgment by the Revisional Court: (1) the judgment attacked must be that of a District Court (roughly corresponding to the District Magistrate in India) or of a Court of Assize (roughly corresponding to the Court of Session); (2) *there must have been a violation of law;* (3) such violation of law must have served as the basis of the decision; (4) the applicant for revision must comply with the procedure laid down. *There can never be any revision as regards questions of fact.* In France, the Court of Cassation, when it upsets a decision, is bound to send the case back. In the Reichstag a similar provision was proposed, but it was negatived. However, the German Court of Revision must *ordinarily* send the case back either to the same Court, or another Court of similar jurisdiction, or, when the decision is reversed for want of jurisdiction, to a competent Court. The Court to which the case is sent is bound by the decision of the Court of Revision on the point of law. The Court of Revision may itself decide the matter in the following cases: (1) when it agrees with the public minister that the minimum punishment prescribed for the offence should be inflicted; (2) when no farther evidence is necessary, and it is of opinion on the evidence on record that the law has been wrongly applied to the facts, it may pronounce judgment of acquittal, stay of proceedings, or condemnation to an invariably fixed punishment, that is, which has neither maximum nor minimum, such, for instance, as confiscation for offences against the revenue or customs.

Any error as to sufficiency or appreciation of the evidence cannot be a ground for revision, nor even insufficiency of the reasons assigned for conviction. As to violation of law, the Code lays down that it consists in non-application or misapplication of the law; and a judgment is conclusively presumed to have been arrived at in violation of the law in the following cases:—

(1) When the Court or Jury were not regularly constituted:

(2) When the Judge or a Juror was legally incompetent to take part in the case (see notes under s. 555):

(3) If a Judge or Magistrate has been objected to on the ground of legitimate suspicion, and such objection has been found valid:

(4) If the Court was not competent, as regards jurisdiction, (personal or territorial):

(5) If the trial has taken place in the absence of the public minister, or some person whose presence was required by law:

(6) If the rules relative to publicity of procedure have been violated:

(7) If the judgment contains no reasons:

(8) If the defence has been restrained in an inadmissible manner on some point essential to the decision.

Violation of the law covers not only acts of the Legislature, but rules and ordinances made by the executive power, in execution of the law, as well as juridical principles and rules admitted in doctrine and practice. As to the violations above enumerated, clause (8) was keenly opposed in the Reichstag, on the ground that the Judge of first instance was alone competent to decide whether the defence had or had not been restrained on a material point, but M. de Schwarze assured the objectors that the Court of Revision would never decide this point, but only whether the allegation appeared to be founded. If rules of law are established solely in the interests of the accused, their violation cannot be urged by the public minister as a ground for reversal to the prejudice of the accused, for instance, the rule that at least a week must elapse between the citation and the trial.

The French Code of Criminal Procedure (409) only permits the public minister to demand the *cassation* of a judgment of acquittal in the interests of the law. The Austrian Code (281), on the other hand, gives equal rights, as regards revision, to the public minister and to the accused. The German Legislator (379) has taken a middle course, and only allows the public minister to demand the reversal of acquittal in a few cases, namely, in (1), (2), (3), and (5) of the violations of the law enumerated above, or on the ground that the right questions have not been put, or that wrong questions have been put, to the jury. But this restriction in the German Code is only with regard to the judgments of the Court of Assize. As regards the decisions of the district tribunals, the public minister is on exactly the same footing as a convicted person. But there is no revision against the appellate decisions of the District Courts, on the ground of violation of rules of procedure only (*error in procedendo* as opposed to *error in judicando*), except only in the case mentioned in Article 298, when the Court to whom a case is sent for re-trial does not conform to the law laid down by the Court of Revision.

"And may enhance the sentence."—In Germany, if the decision has been attacked only by the accused, or by the public minister in his interests, the new decision (that is, of the Lower Court to whom the case is sent for re-trial) must not give a more severe punishment than the first decision.—Germ. C. P. C., 398.

Optional with Court to hear parties.

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision: Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, paragraph two.

The Calcutta High Court think that a Magistrate should not shew cause by a letter addressed to the Registrar. See notes under s. 435, *supra*. But such a mode of shewing cause is convenient and fair to the Magistrate and is the practice in England. A Justice, when his decision is called in question in a superior Court, may file an affidavit, showing grounds of decision and any facts which he may consider to have a material bearing on the question at issue, without payment of any fee, and may forward it by post. The Court is bound to take into consideration all matters contained in such affidavit, notwithstanding non-appearance of counsel in support—(35 and 36 Vict., c. 26, ss. 2, 3.) Considering the number of applications for revision, the Government Advocates cannot be employed in every case. S. 441 should be made applicable to all Magistrates.

In Germany, the accused may appear personally (except when he is in custody) or by a defender. The public minister may also appear. —Germ. C. P. C., 390, 391.

Statement by Presidency Magistrate of grounds of his decision to be considered by High Court.

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before overruling or setting aside the said decision or order.

High Court's order to be certified to Lower Court or Magistrate.

442. When a case is revised under this chapter by the High Court, it shall certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

PART VIII.

SPECIAL PROCEEDINGS.

CHAPTER XXXIII.

CRIMINAL PROCEEDINGS AGAINST EUROPEANS AND AMERICANS.

Magistrates who may inquire into and try charges against European British subjects.

443. No Magistrate, unless he is a Justice of the Peace, and (except in the case of a *District Magistrate or* Presidency Magistrate) unless he is a Magistrate of the first class and an European British subject,

shall inquire into or try any charge against an European British subject.

This and other sections in this chapter were amended by Act III of 1884 (Ilbert Bill).

Sessions Judge to be an European British subject.

Assistant Sessions Judge to have held office for three years and to be specially empowered.

444. No Judge presiding in a Court of Session *except the Sessions Judge* shall exercise jurisdiction over an European British subject unless he himself is an European British subject; and if he is an Assistant Sessions Judge, unless he has held the office of Assistant Sessions Judge for at least three years, and has been specially empowered in this behalf by the Local Government.

Cognizance of offence committed by European British subject.

445. Nothing in section 443 or section 444 shall prevent any Magistrate from taking cognizance of an offence committed by any European British subject in any case in which he could take cognizance of a like offence if committed by another person:

Provided that, if he issues any process for the purpose of compelling the appearance of an European British subject accused of an offence, such process shall be made returnable before a Magistrate having jurisdiction to inquire into or try the case.

Sentences which may be passed by Provincial Magistrates.

446. Notwithstanding anything contained in section 32 or section 34, no Magistrate other than a *District Magistrate or* Presidency Magistrate shall pass any sentence on an European British subject other than imprisonment for a term which may extend to three months, or fine which may extend to one thousand rupees, or both; *and a District Magistrate shall not pass any such sentence other than imprisonment for a term which may extend to six months, or fine which may extend to two thousand rupees, or both.*

When commitment is to be to Court of Session and when to High Court.

447. When an European British subject is accused of an offence before a Magistrate, and such offence cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magis-

trate shall, if he thinks that the accused ought to be committed, commit him to the Court of Session, or, in the case of a Presidency Magistrate, to the High Court.

When the offence which appears to have been committed is punishable with death or with transportation for life, the commitment shall be to the High Court.

Trial of offences of which one is, and the others are not, punishable with death or transportation for life.

448. Where any person committed to the High Court under section 447 is charged with several offences of which one is punishable with death or transportation for life and the others with a less punishment, and the High Court considers that he should not be tried for the offence punishable with death or transportation, the High Court may, nevertheless, try him for the other offences.

Sentences which may be passed by Court of Session.

449. Notwithstanding anything contained in section 31, no Court of Session shall pass on any European British subject any sentence other than a sentence of imprisonment for a term which may extend to one year, or fine, or both.

Procedure when Sessions Judge finds his powers inadequate.

If, at any time after the commitment and before signing judgment, the presiding Judge thinks that the offence which appears to be proved cannot be adequately punished by such a sentence, he shall record his opinion to that effect and transfer the case to the High Court. Such Judge may either himself bind over, or direct the committing Magistrate to bind over, the complainant and witnesses to appear before the High Court.

450. Repealed by s. 6, Act III of 1884.

Jury or assessors before High Court or Court of Session.

451. (1) In trials of European British subjects before a High Court or Court of Session, if, before the first juror is called and accepted, or the first assessor is appointed, as the case may be, any such subject requires to be tried by a mixed jury, the trial shall be by a jury of which not less than half the number shall be Europeans or Americans or both Europeans and Americans.

(2) When any such trial before a Court of Session would, in the ordinary course, be with the aid of assessors, the European British subject accused, or, where there are

several European British subjects accused, all of them jointly, may, instead of claiming to be tried by a mixed jury under sub-section (1), require that not less than half the number of the assessors shall be Europeans or Americans or both Europeans and Americans.

Right of European British subject to claim jury before District Magistrate.

451*A*. (1) In trials of European British subjects before a District Magistrate, any such subject may, in a summons-case before he is heard in his defence under section 244, or in a warrant-case before he enters on his defence under section 256, claim that the trial shall be by a jury composed in manner prescribed by section 451.

(2) If a claim is made under sub-section (1) in a summons-case at the time when the Magistrate proceeds under section 244 to hear the accused, or in a warrant-case at the time when the Magistrate calls upon the accused under section 256 to enter upon the defence, the Magistrate shall forthwith issue the necessary orders for the trial by a jury as aforesaid.

(3) If such a claim is made at an earlier stage of the proceedings, the Magistrate shall issue such orders whenever it appears to him from the evidence recorded that there will be a sufficient case to go before a jury.

(4) In every such case the Magistrate shall, notwithstanding anything contained in section 242, before issuing any orders as aforesaid, frame a formal charge.

(5) The provisions of sections 211, 216, 217, 219, and 220 shall, so far as may be, apply for the purpose of securing the attendance of the complainant, the accused, and the witnesses at every trial to be held under this section.

(6) The provisions of this Code relating to the procedure in a trial by jury before a Court of Session shall, as nearly as may be, apply to every trial under this section as if the District Magistrate were a Sessions Judge and the accused had been committed to his Court for trial.

(7) All Courts may construe any of the provisions referred to in sub-section 5 or sub-section (6), in so far as they are made applicable by that sub-section, with such verbal alterations not affecting the substance as may be necessary or proper to adapt the same to the matter before them.

(8) Nothing in this section shall affect the power of the Magistrate to commit an accused person for trial under section 347 or section 447.

Transfer to another Court in certain cases.

451*B*. (1) If an accused person claims to be tried by jury under section 451*A*, and in the opinion of the District Magistrate there is reason to believe that a jury composed in manner prescribed by section 451 cannot be constituted for the trial before himself, or cannot be so constituted without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, he may, instead of issuing orders for the trial before himself under section 451*A*, transfer the case for trial to such other District Magistrate or to such Sessions Judge as the High Court may, from time to time, by rules made by it in this behalf and approved by the Local Government, or by special order, direct.

(2) When a case is transferred under this section to a Sessions Judge or District Magistrate, he shall with all convenient speed try it with the same powers (including the power of commitment), and according to the same procedure as if he were a District Magistrate acting under section 451*A*.

Sections 451*A* and 451*B* are added by s. 8, Act III of 1884.

Trial of European British subject and native jointly accused.

452. In any case in which an European British subject is accused jointly with a person not being an European British subject, and such European British subject is committed for trial before a High Court or Court of Session, such subject and person may be tried together, and the procedure on the trial shall be the same as it would have been had the European British subject been tried separately:

When native may claim separate trial.

Provided that if the European British subject requires under section 451 to be tried by a mixed jury, or by a mixed set of assessors, and the person not being an European British subject requires that he shall be tried separately, the latter person shall be tried separately in accordance with the provisions of Chapter XXIII.

Procedure on claim of person to be dealt with as European British subject.

453. When any person claims to be dealt with as an European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purposes of the in-

quiry or trial; and such Magistrate shall inquire into the truth of such statement, and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject, and shall deal with him accordingly. If any such person is convicted by such Magistrate and appeals from such conviction, the burden of proving that the Magistrate's said decision was wrong shall lie upon him.

When any such person is committed by the Magistrate for trial before the Court of Session, and such person before such Court claims to be dealt with as an European British subject, such Court shall, after such further inquiry, if any, as it thinks fit, decide whether he is or is not an European British subject, and shall deal with him accordingly. If he is convicted by such Court and appeals from such conviction, the burden of proving that the Court's said decision was wrong shall lie upon him.

When the Court before which any person is tried decides that he is not an European British subject, such decision shall form a ground of appeal from the sentence or order passed in such trial.

Failure to plead status a waiver.

454. If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if when such claim has been made before, and disallowed by, the committing Magistrate, it is not again made before the Court to which such subject is committed, he shall be held to have relinquished his right to be dealt with as such European British subject, and shall not assert it in any subsequent stage of the same case.

Unless the Magistrate has reason to believe that any person brought before him is not an European British subject, the Magistrate shall ask such person whether he is such a subject or not.

Trial under this chapter of person not an European British subject.

455. Where a person who is not an European British subject is dealt with as such under this chapter, and does not object, the inquiry, commitment, trial or sentence (as the case may be) shall not, by reason of such dealing, be invalid.

Right of European British subject unlawfully detained to apply for order to be brought before High Court.

456. When any European British subject is unlawfully detained in custody by any person, such European British subject or any person on his behalf may apply to the High Court which would have jurisdiction over such European British subject in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the High Court to abide such further order as it may pass.

Procedure on such application.

457. The High Court, if it thinks fit, may, before issuing such order, inquire, on affidavit or otherwise, into the grounds on which it is applied for, and grant or refuse such application; or it may issue the order in the first instance, and, when the person applying for it is brought before it, it may make such further order in the case as it thinks fit, after such inquiry (if any) as it thinks necessary.

Territories throughout which High Court may issue such order.

458. The High Court may issue such orders throughout the territories within the local limits of its appellate criminal jurisdiction, and such other territories as the Governor-General in Council may direct.

Application of Acts conferring jurisdiction on Magistrates or Court of Session.

459. Unless there is something repugnant in the context, all enactments heretofore or hereafter made by the Governor-General in Council, which confer on Magistrates or on the Court of Session jurisdiction over offences, shall be deemed to apply to European British subjects, although such persons be not expressly referred to therein.

Nothing in this section shall be deemed to authorize any Court to exceed the limits prescribed by this chapter as to the amount of punishment which it may inflict on an European British subject, or to confer jurisdiction on any Magistrate *or any Judge presiding in a Court of Session* not being a Justice of the Peace.

Jury for trial of Europeans or Americans.

460. In every case triable by jury or with the aid of assessors, in which an European (not being an European British subject) or an American is the accused person, or

one of the accused persons, not less than half the number of jurors or assessors shall, if practicable, and if such European or American so claims, be Europeans or Americans.

Jury when European or American charged jointly with one of another race.

461. Whenever an European or American is charged before the Court of Sessions jointly with a person not an European or American, and in compliance with a claim made under section 460 is tried by a jury, or with the aid of a set of assessors, of which at least one-half consists of Europeans and Americans, the latter person shall, if he so claims, be tried separately.

Summoning and empanelling jurors under section 451 or 460.

462. When a trial is to be held before the Court of Session in which the accused person, or one of the accused persons, is entitled to be tried by a jury constituted under the provisions of section 451 or section 460, *or before the Court of a District Magistrate or Sessions Judge proceeding under section* 451*A or* 451*B*, the Court shall, three days at least before the day fixed for holding such trial, cause to be summoned in the manner hereinbefore prescribed, as many European and American jurors as are required for the trial.

The Court shall also at the same time in like manner cause to be summoned the same number of other persons named in the revised list, unless such number of such other persons has been already summoned for trials by jury at that session.

From the whole number of persons returned, the jurors who are to constitute the jury shall be chosen by lot in the manner prescribed in section 276, until a jury containing the proper number of Europeans or Americans, or a number approaching thereto as nearly as practicable, has been obtained:

Provided that in any case in which the proper number of Europeans and Americans cannot otherwise be obtained, the Court may, in its discretion, for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320.

Conduct of criminal proceedings against European British subjects, &c.

463. Criminal proceedings against European British subjects, Europeans not being European British subjects, and Americans, before the Court of Session and High Court, shall, except as otherwise ex-

pressly provided, be conducted according to the provisions of this Code.

CHAPTER XXXIV.

LUNATICS.

Procedure in case of accused being lunatic.

464. When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the District or such other medical officer as the Local Government directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall postpone further proceedings in the case.

"Every constable of a parish or place and every relieving officer and overseer of any parish, who shall have knowledge that any person found wandering at large within such parish or place is deemed to be a lunatic, shall immediately apprehend and take such person before a Justice."—16 & 17 Vict., c. 97, s. 68. There is a similar provision in India.—Act XXXVI, 1858, ss. 4, 6.

Procedure in case of person committed before Court of Session or High Court being lunatic.

465. If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury or the Court with the aid of assessors shall, in the first instance, try the fact of such unsoundness and incapacity, and, if satisfied of the fact, shall pass judgment accordingly, and thereupon the trial shall be postponed.

The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

"When the defendant pleads any plea other than not guilty, and an issue of fact is joined thereon, the truth of the plea must be tried by a jury empannelled for that purpose. It seems, but is not certain, that in such cases no peremptory challenges are allowed."—Steph. Dig., C. P. C., 284.

466. Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, if the case is one in which bail may be taken, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

Release of lunatic pending investigation or trial.

If the case is one in which bail may not be taken, or if sufficient security is not given, the Magistrate or Court shall report the case to the Local Government, and the Local Government may order the accused to be confined in a lunatic asylum or other suitable place of safe custody, and the Magistrate or Court shall give effect to such order.

Custody of lunatic.

467. Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

Resumption of inquiry or trial.

When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

468. If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

Procedure on accused appearing before Magistrate or Court.

If the Magistrate or Court considers the accused person to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465, as the case may be.

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an

When accused appears to have been insane.

offence, and that he was at the time when the act was committed by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

Judgment of acquittal on ground of lunacy.

470. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Person acquitted on such ground to be kept in safe custody.

471. Whenever such judgment states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be kept in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the case for the orders of the Local Government.

The Local Government may order such person to be confined in the lunatic asylum, jail or other suitable place of safe custody.

Lunatic prisoners to be visited by Inspector-General.

472. When any person is confined under the provisions of section 466 or section 471, the Inspector-General of Prisons, if such person is confined in a jail, or the Visitors of the lunatic asylum, or any two of them, if he is confined in a lunatic asylum, may visit him in order to ascertain his state of mind; and he shall be visited once at least in every six months by such Inspector-General or by two of such Visitors as aforesaid; and such Inspector-General or Visitors shall make a special report to the Local Government as to the state of mind of such person.

Procedure where lunatic prisoner is reported capable of making his defence.

473. If such person is confined under the provisions of section 466, and such Inspector-General or Visitors shall certify that, in his or their opinion, such person is capable of making his defence, he

shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of section 468; and the certificate of such Inspector-General or Visitors as aforesaid shall be receivable as evidence.

Procedure where lunatic confined under section 466 or 471 is declared fit to be discharged.

474. If such person is confined under the provisions of section 466 or section 471, and such Inspector-General or Visitors shall certify that, in his or their judgment, he may be discharged without danger of his doing injury to himself or to any other person, the Local Government may thereupon order him to be discharged, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a commission, consisting of a judicial and two medical officers.

Such commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government, which may order his discharge or detention as it thinks fit.

Delivery of lunatic to care of relative.

475. Whenever any relative or friend of any person confined under the provisions of section 466 or section 471 desires that he shall be delivered over to his care and custody, the Local Government, upon the application of such relative or friend, and on his giving security to the satisfaction of such Government that the person delivered shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, may order such person to be delivered to such relative or friend.

Whenever such person is so delivered, it shall be upon condition that he shall be produced for the inspection of such officer and at such times as the Local Government directs.

The provisions of sections 472 and 474 shall, *mutatis mutandis*, apply to persons delivered under the provisions of this section; and the certificate of the inspecting officer appointed under this section shall be receivable as evidence.

Power of Governor-General in Council to order criminal lunatics confined by order of Local Government to be removed from one province to another.

475*A*. The Governor-General in Council may direct that any person whom the Local Government has ordered under this chapter to be confined in a lunatic asylum, jail or other place of safe custody, shall be removed from the place where he is confined to any lunatic asylum, jail or other place of safe custody in British India.

Power of Local Government to relieve Inspector-General of certain functions.

475*B*. The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of section 466 or section 471 to discharge all or any of the functions of the Inspector-General of Prisons under section 472, section 473 or section 474.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE.

Procedure in cases mentioned in section 195.

476. When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in section 195, and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence on such inquiry or trial.

Such Magistrate shall thereupon proceed according to law, and may, if he is authorized under section 192 to transfer cases, transfer the inquiry or trial to some other competent Magistrate.

In France, if a witness, during a trial, appears to have given false evidence, the President can, of his own motion, or at the request of the Procureur-Général, the civil party, or the accused, have the witness arrested and sent for trial—C. P. C., 330. The Court of Cassation has ruled that a witness, suspected of false testimony, may be kept in close custody till the close of the case—Cass., 28th December

1838; 24th January 1851. It is absurd to say that such a procedure prejudices the accused. On the other hand, omission to adopt such procedure is in some cases likely to prejudice the truth. A witness for the prosecution may wilfully make statements which are obviously false. It is surely in the interests of the accused that such contempt should be dealt with at once, and *vice versâ*. In some case the Calcutta High Court found fault with a Judge for committing a witness during the trial of a civil suit. But it is of the essence of such procedure that it should be instantaneous. It is intended to deter false witnesses, and *there is no reason why truthful witnesses should be intimidated.* Indeed, they ought not to know what has happened, as they are kept outside and only brought in when required to give evidence. When a witness appears to have given false evidence, or to have concealed some fact of which he must have had knowledge, the Court may, of its own accord, or at the instance of the parties, direct him to be forthwith arrested and proceeded against according to law. But this order may be revoked if the witness retracts and reveals the truth before the close of the proceedings. Indian Judges may consider that such procedure might frighten the other witnesses; but firstly, those examined on the same day ought not to know of it, and secondly, the evidence may be *against* as well as for the accused.—Ital. C. P. C., 312, 313.

In Italy, when in the course of a civil suit it shall appear that a criminal offence has been committed, the Judge is bound to inform the public minister, who will set in motion the penal action in accordance with the law. The civil suit will be suspended, *if the decision of the criminal case ought to have an influence on the civil decision*, save where it is specially provided to the contrary.—Ital. C. P. C., 31.

Power of Court of Session as to such offences committed before itself.

477. Subject to the provisions of section 444, a Court of Session may charge a person for any offence referred to in section 195 and committed before it, or brought under its notice in the course of a judicial proceeding, and may commit, or admit to bail and try, such person upon its own charge.

Such Court may direct the Magistrate to cause the attendance of any witnesses for the purposes of the trial.

Power of Civil and Revenue Courts to complete investigation and commit to High Court or Court of Session.

478. When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to

bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

For the purposes of an inquiry under this section, the Civil or Revenue Court may, subject to the provisions of section 443, exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, and shall be deemed to have been held by a Magistrate.

Procedure of Civil Court in such cases.

479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorized to commit for trial; and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witness for the prosecution and defence.

Procedure in certain cases of contempt.

480. When any such offence as is described in section 175, section 178, section 179, section 180, or section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender, whether he is an European British subject or not, to be detained in custody; and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

Nothing in section 443 or section 444 shall be deemed to apply to proceedings under this section.

In Italy those in Court must have their head uncovered; must be silent and respectful. It is forbidden, during the hearing of a case, to show signs of approbation or disapprobation; to cause any interruption or to make any sort of disturbance whatever. Those who disobey may be turned out of Court; if they resist, or come into Court again, they may be confined for 24 hours. If the noise or disturbance is accompanied by insults or violence, punishment can be pronounced at once at the same or at the following sitting. There is an appeal, if a correctional punishment be awarded, but not against a simple police punishment. If the guilty party cannot be forthwith arrested, sentence may nevertheless be pronounced at once, and there is no opposition to such a sentence.—Ital. C. P. C., 620—623.

Held, in America, that the power to punish for contempt is an incident to all courts, independent of statutory provision. A contempt may consist as well in the matter presented (in a petition) as in the manner of the person committing it.—5 Col. 436.

In France, the Court may expel anyone who makes any sort of disturbance, even by making signs of approbation or disapprobation. If such person resists, the Court may order his arrest and imprisonment for 24 hours. If the disturbance is accompanied by insults or violence, requiring more severe punishment, such punishment can be pronounced at once without appeal if not more than 15 francs fine or five days' imprisonment.—C. P. C., 504, 505. The Court of Cassation has ruled that if the facts amount to an outrage towards the Magistrate, he must apply s. 222 of the Penal Code—Cass., 28th November 1856. The delict must be punished at once, but if not punished at the same sitting, it comes under the ordinary correctional jurisdiction.—Cass., 19th March 1812; 3rd October 1851.

If words imply either from their meaning or the gesture and manner accompanying them that an insult is intended and understood, they amount to contempt of court. For the bystanders of the moment may, from the use of such language, conceive a contemptuous opinion of its authority, if no remedy be available.—*Wilson's case*, 7 Q. B., 1015. Each Court is presumed to know its own law and to put the right interpretation on the character of the act done, so far as it is contemptuous, *for if the contempt is by a gesture, none but the Court can judge of it.—Re Pater*, 5 B. & S., 299. In England, when a superior Court of record commits for contempt, the commitment need only mention that a contempt of court was committed without stating further particulars, it being deemed conclusive, and as if the Court could not go wrong in such a matter.—*Re Crawford*, 13 Q. B., 613; *Re Pater*, 5 B. & S., 299.

As to imprisonment for contempt of court, Paterson remarks: For reasons similar to those that actuate the High Court of Parliament, Courts of Justice have a like practice of committing certain offenders for contempt of court. Every Court of record has an inherent right to punish for contempt. There are superior and inferior Courts of record. Where an inferior Court commits for contempt, a superior Court will not interfere with its action, except only to see that the inferior Court has not travelled beyond its jurisdiction, *for such inferior Court must be credited with the knowledge of its own business.* The usual causes for an attachment for contempt are an obstruction or contemptuous treatment of officers of the Court and the process served—rescue of prisoners—insulting conduct in Court—libels on judges or courts, or officious publications prematurely made relating to pending trials—imputations of corruption—intimidation or obstruction of witnesses—non-payment of money ordered by the Court to be paid.

In Germany, persons who do not obey directions given by the Court for the maintenance of order, may be forcibly ejected or kept in custody for 24 hours. If any person is guilty of any fault, such as disturbance, insult, outrage, expression of approbation or disapprobation, the Court may, without prejudice to a criminal prosecution, sentence him to a fine of 100 marks, or three days' imprisonment, and direct the sentence to be forthwith carried out. Advocates engaged in the case are liable to the fine only; but ad-

vocates not so engaged are on the same footing as any other person. —Germ. C. O. J., 177—180. No separate record is required, a note simply being made on the record of the case.

Record in such cases.

481. In every such case, the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

If the offence is under section 228 of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

Procedure where Court considers that case should not be dealt with under section 480.

482. If the Court in any case considers that a person accused of any of the offences referred to in section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is, for any other reason, of opinion that the case should not be disposed of under section 480 such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or, if sufficient security is not given, shall forward such person under custody to such Magistrate.

The Magistrate to whom any case is forwarded under this section shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

When Registrar or Sub-Registrar to be deemed a Civil Court within sections 480 and 482.

483. When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1877, shall be deemed to be a Civil Court within the meaning of sections 480 and 482.

Discharge of offender on submission or apology.

484. When any Court has under section 480 adjudged an offender to punishment for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption,

the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

Imprisonment or committal of person refusing to answer or produce document.

485. If any witness before a Criminal Court refuses to answer such questions as are put to him, or to produce any document in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court, for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

This provision is taken from 11 & 12 Vict., c. 42, s. 16.

Appeals from convictions in contempt-cases.

486. Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding or reduce or reverse the sentence appealed against.

An appeal from such conviction by a Court of Small Causes in a Presidency-town shall lie to the High Court, and an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the Sessions Division within which such Court is situate.

An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or, in the Presidency-towns, to the High Court.

Certain Judges and Magistrates not to try offences referred to in section 195 when committed before themselves.

487. Except as provided in sections 477, 480, and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, the Recorder of Rangoon, and the Presidency Magistrates, shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

Nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court, from himself committing any case to such Court or shall prevent a Presidency Magistrate from himself disposing of any case instead of sending it for inquiry to another Magistrate.

CHAPTER XXXVI.

OF THE MAINTENANCE OF WIVES AND CHILDREN.

Order for maintenance of wives and children.

488. If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Subdivisional Magistrate, or a Magistrate of the first class, may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

Such allowance shall be payable from the date of the order.

Enforcement of order.

If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month :

Provided that, if such person offers to maintain his wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her; and may make an order under this section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

Proviso.

No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

All evidence under this chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases.

An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother, although her husband is able to maintain the child 7 Q. B. D., 264. But the Justices have a discretion under 35 and 36 Vict., c. 65, to order payments for a less period than the maximum period, and an order for payment until the child attains the age of sixteen *or until the mother marries* is good—7 Q. B. D., 260. *Quære*—Can a maintenance case in India be settled by the payment of a lump sum to the mother? The following case is from England: The respondent had obtained an order for the support of her bastard child. Subsequently, in consideration of a sum of money, she agreed to release and indemnify the appellant for ever from all actions, suits, and proceedings in respect of the child: *Held*, that this agreement was no bar to the jurisdiction of the Justices to enforce the order on the application of the mother—*Griffiths* v. *Evans*, 46 L. T., 417.

The New York Procedure Code (924) defines a bastard as a child who is begotten and born—(1) out of lawful matrimony; (2) while the husband of its mother was separate from her for a whole year previous to its birth; or (3) during the separation of its mother from her husband, pursuant to a judgment of a competent Court. Section 925 enacts that the *father and mother* of a bastard are liable for its support. In England, it has been held that a man is not bound to maintain a bastard child of his wife born before his marriage, unless of course he has agreed to maintain it.—*R.* v. *Maude*, 11 L. J. M. C., 120.

Where a wife leaves her husband in consequence of ill-usage, Justices may make an order upon him to contribute to her separate support, although he offers to receive her back again.—*Thomas* v. *Alsop*, 39 L. J. M. C., 43.

In England doubts have arisen in bastardy cases as to the competency of the putative father to be sworn as a witness on his own behalf; but Erle, J., has held him to be competent, on the ground that the proceedings on an affiliation order are of a civil and not of a criminal nature. *Ex parte Crawley*, 24 L. T., 244; Powell's Evidence (2nd Ed.) 37, 38. It is enacted by 28 and 29 Vict., c. 104, s. 34, that proceedings at law on the revenue side of the Exchequer shall not be deemed to be criminal proceedings. In several instances the Legisture has stepped in to make defendants competent witnesses. (See Licensing Act, and Employers and Workmen Act, 1875, 38 and 39 Vict., c. 90). See notes under s. 342, *supra*.

In England, the father may be ordered to pay the expenses incidental to the birth of the child as well the weekly sum of five shillings till the child attain the age of sixteen. If he fail for a month to pay, he may be arrested and brought before the Justices; and if he still refuse, his goods may be seized to pay the sum due, and failing payment in that way, he may be committed to jail for three months- 35 and 36 Vict., c. 65, s. 4. In England, as the law throws the burden of the maintenance of a bastard child exclusively on the mother, with a power to enforce a contribution against the putative father, it follows that she should have the right to the exclusive custody of such child as against the father, till the child attain the age of sixteen. After that age the child cannot be controlled in any way against his or her consent.

Is a man bound to maintain the child of his wife born a few months after his marriage with her? See s. 112 of the Evidence Act. In South Carolina, where a child was born four months after the marriage, it was held that illegitimacy might be shewn by any competent evidence, and proof thereof was not restricted to proof of impotency on the part of the husband, of impossibility of access, or of intercourse between the wife and a man other than her husband.—18 S. C., 59.

"Any Person".—Apparently these words will cover the mother. In England, the mother is bound by statute to maintain her illegitimate child till the age of sixteen; or, if the child is a female, and marries under that age, then till marriage. In Scotland, the obligation continues on both parents for ever, if the child is not in business, or otherwise provided for. In England, the mother is entitled, as against third parties, to the custody of her illegitimate child till the age of seven, and it seems she (or her husband if any) is entitled also to the age of sixteen. Whoever marries a woman is expressly bound by statute to maintain her illegitimate as well as legitimate children till the age of sixteen. See Pat. Eng. and Scotch Law, p. 282, and references.

Alteration in allowance.

489. On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make

such alteration in the allowance as he thinks fit, provided the monthly rate of fifty rupees be not exceeded.

Enforcement of order of maintenance.

490. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order shall be enforceable by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

CHAPTER XXXVII.

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS.

Power to issue directions of the nature of a *habeas corpus*.

491. Any of the High Courts of Judicature at Fort William, Madras, and Bombay may, whenever it thinks fit, direct—

(*a*) that a person within the limits of its ordinary original civil jurisdiction be brought up before the Court to be dealt with according to law;

(*b*) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;

(*c*) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(*d*) that a prisoner detained as aforesaid be brought before a Court-Martial or any Commissioners acting under the authority of any Commission from the Governor-General in Council for trial or to be examined touching any matter pending before such Court-Martial or Commissioners respectively;

(*e*) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(*f*) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

Each of the said High Courts may, from time to time, frame rules to regulate the procedure in cases under this section.

Nothing in this section applies to persons detained under Bengal Regulation III of 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the Acts of the Governor-General in Council, No. XXXIV of 1850, or No. III of 1858.

See s. 100, *supra*, which empowers a Magistrate of the first class to issue within his jurisdiction what is equivalent to a writ of *homine replegiando* or *habeas corpus*. See also s. 551, *infra*. High Courts have no power to issue orders under this section as regards natives outside the limits of their original civil jurisdiction. But as to European British subjects, see s. 456.

The *Habeas Corpus* Act is 31 Car. 2, c. 2. It was remedied by 56 Geo. III, c. 100. The course of direct legislation terminates with 25 Vict., c. 20, passed in consequence of the decision of the Court of Queen's Bench in *Anderson's case* (3 E. & E., 487), where the writ was issued into Upper Canada. Section 1 of the Statute enacts that "no writ of *Habeas Corpus* shall issue out of England by authority of any Judge therein into any colony or foreign dominion of the Crown, where Her Majesty has lawfully established Courts of Justice, having authority to grant and issue the said writ, and to ensure the due execution thereof *throughout* such colony or dominion." The Extradition Act, 1870, (33 & 34 Vict., c. 52, s. 11), provides that every person committed to prison under that Act shall be informed by the Magistrate of his right to apply for a writ of *Habeas Corpus*; and a similar provision is contained in the Statute 44 and 45 Vict., c. 69, relating to the trial of fugitive offenders. In England, there were a diversity of remedies allowed for false imprisonment:

(*a*) *de homine replegiando*.—See Steph. Com. iii, 627.

(*b*) *de odio et atiâ*.—The writ was directed to the Sheriff to inquire if a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, on account of hatred and ill-will:

(*c*) Habeas Corpus:

(*d*) an appeal of imprisonment:

(*e*) by writ *de manucaptione*.

PART IX

SUPPLEMENTARY PROVISIONS.

CHAPTER XXXVIII.

OF THE PUBLIC PROSECUTOR.

Power to appoint public prosecutors.

492. The Governor-General in Council or the Local Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called public prosecutors.

In any case committed for trial to the Court of Session, the District Magistrate, or, subject to the control of the District Magistrate, the Subdivisional Magistrate, may, in the absence of the public prosecutor, or where no public prosecutor has been appointed, appoint any other person, not being an officer of police below the rank of Assistant District Superintendent, to be public prosecutor for the purpose of such case.

In England, there is no public prosecutor, and no legal duty is imposed on any person to prosecute. But, generally speaking, any person may, if he choose, prosecute. In cases taken up by the Government, the Attorney-General conducts the prosecution. In Scotland, the Lord Advocate and his four Deputy-Advocates and his local representatives, called procurators-fiscal, are charged with the duty of prosecuting. If the public prosecutor refuse, the private party injured or his kinsmen may prosecute, but not strangers.—Eng. and Scotch Law, p. 320.

In France, it is the duty of the Procureurs of the Republic to inquire into and prosecute all delicts, which are cognizable by the tribunals of correctional police, or the Court of Assize. He is bound to give information of delicts to the Procureur-Général, and to carry out his orders.—C. P. C., 22, 27.

In Germany, there is a public minister attached to every Court. His territorial competence is determined by that of the Court to which he is attached. In the exercise of his functions, he is independent of the Courts. Gendarmes, police officers, field and forest-guards are bound to obey his instructions.—Germ. C. O J., tit. x.

Public prosecutor may plead in all Courts in cases under his charge.

493. The public prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal; and, if any private person instructs a pleader to prosecute in any Court any person in any such case, the public prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions.

Pleaders, privately instructed, to be under his direction.

"The public prosecutor," remarks Stephen, "has no other duties than those of an ordinary counsel for the Crown. He has nothing to do with getting up the case."

Effect of withdrawal from prosecution.

494. Any public prosecutor appointed by the Governor-General in Council or the Local Government may, with the consent of the Court in cases tried by jury before

the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person; and, upon such withdrawal,

(*a*) if it is made before a charge has been framed, the accused shall be discharged;

(*b*) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

Permission to conduct prosecution.

495. Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below a rank to be prescribed by the Local Government in this behalf with the previous sanction of the Governor-General in Council.

Any person conducting the prosecution may do so personally or by a pleader.

An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

CHAPTER XXXIX.

OF BAIL.

Bail to be taken in case of bailable offence.

496. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a Police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer, or at any stage of the proceedings before such Court, to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

In Italy, the Court, in giving bail, may order the accused to keep away from a certain place, or to reside in a certain specified commune.—Ital. C. P. C., 213. This is a very salutary power.

"If persons in custody for a bailable offence wish to send for bail, and are willing to pay for a messenger or telegram being sent, the officer in charge of the station is to take the necessary steps without delay."—Metrop. Police Orders.

When bail may be taken in case of non-bailable offence.

497. When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a Police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused.

If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed such offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

Any Court may, at any subsequent stage of any proceeding under this Code, cause any person who has been released under this section to be arrested, and may commit him to custody.

When the defendants, who were members of an extensive organization, were accused of a riot arising out of the agitation created by the said organization, bail was refused by the local Magistrates:—*Held*, that the latter had acted properly, considering, first, the serious nature of the offence charged; secondly, the probability of the association, of which the defendants were members, furnishing them with funds to indemnify the bailsmen in case of default on the part of the defendants.—*Reg.* v. *Butler*, 14 Cox, C. C., 530.

In Louisiana, if the offence be not bailable of right, but the proof is not evident nor the presumption great, the Magistrate must take bail.—Lou. C. P. C., 190. But no Justice of the Peace can bail a prisoner after commitment—*Id.*, 198. In order to make bail a sure pledge for the appearance of the party, it must be determined by considering:

1. The nature of the punishment to be inflicted on conviction.
2. The pecuniary circumstances of the party accused.

Where the punishment of the offence is a pecuniary penalty only, the bail must be greater than the highest fine that can be imposed.—*Id.*, 199, 200. There are other detailed rules concerning bail.

"He shall not be so released if there *appear reasonable grounds for believing* that he has been guilty, &c." In England, if a Justice take bail, where he ought not to, a criminal information may, in some cases, be obtained against him.—Bac. Ab. Bail; 6 Mod., 179; Hawk, b. ii, c. 15.

It is to be feared that Courts in India often give bail in cases where they should refuse it. Mukhtars often urge that their clients are not likely to run away, but one of the main reasons for refusing bail is to prevent the accused from tampering with the witnesses

or in other ways interfering with the course of justice. In Germany bail may be refused, when there are grave presumptions against the accused, when he is suspected of wishing to take flight, when there are reasons for thinking that he will cause to disappear traces of the offence, or that he will urge his accomplices to make false statements or the witnesses to give false testimony or not to appear at all. An accused must be presumed to have the intention of taking flight: (1) when the offence charged is a crime. (A crime is an offence punishable with death, reclusion or detention for more than five years); (2) when the accused has no proper residence (*Heimathlos*), or is in a state of vagabondage, or cannot establish his identity (the Penal Code punishes vagabonds for the simple fact of being vagabonds); (3) when he is a foreigner (that is, an inhabitant of some place outside the German Empire, Penal Code, Article 8); and there is reason to doubt that he will appear on a summons. If the offence is punishable with simple imprisonment or fine only, bail can only be refused if the accused is suspected of wishing to take flight, and that only when he belongs to the above classes (2) or (3), or is under police surveillance, or, by reason of vagabondage, is at the disposal of the police.—Germ. C. P. C., 112, 113.

A person arrested must be interrogated by a *Judge* not later than the day following that on which he is sent to prison, even if such day be a holiday or a Sunday.—*Id.*, 115. The person detained (*hajut* prisoner) can, at his own expense, provide himself with food and occupation suitable to his position and personal resources, provided they are not incompatible with the object of his detention, and neither affect the discipline of the prison nor the public security. If he is dangerous, or meditates suicide or escape, he may be put in irons, but such a measure must be reported to the Judge of the Bailiwick for sanction. A *hajut* prisoner must be kept isolated and separate from sentenced prisoners.—*Id.*, 116; Aust. C. P. C., 184. Bail may be by sureties, or deposit of cash or valuables, or by a pledge of moveables.—*Id.*, 118. The Austrian Code only allows the mortgage of landed property or stocks, Article 193. An under trial prisoner can communicate verbally or in writing with his defender, but the Judge may direct that a judicial functionary be present at the interviews.—*Id.*, 148.

Power to direct admission to bail or reduction of bail.

498. The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail, required by a Police-officer or Magistrate be reduced.

Bond of accused and sureties.

499. Before any person is released on bail or released on his own bond, a bond for such sum of money as the Police-officer or Court, as the case may be, thinks

sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties, conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the Police-officer or Court as the case may be.

If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

Discharge from custody.

500. As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

Nothing in this section, section 496 or section 497, shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

Power to order sufficient bail when that first taken is insufficient.

501. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest, directing that the person released on bail be brought before it, and may order him to find sufficient sureties, and on his failing so to do may commit him to jail.

In England, Justices may examine sureties on oath as to the nature and value of their property.—2 Hale., P. C., 125; Hawk., ii., c. 15. In order to satisfy the prosecution, the Judge or Justices may require the prisoner to give 24 or 48 hours' previous notice; that inquiries may be made as to the sufficiency of the bail.—*R.* v. *Carlile*, 6 C. & P, 628. The defendant's attorney may give bail, if qualified in other respects. The High Court of Justice has a discretion to admit to bail persons committed for trial, but they cannot interfere where the imprisonment is for contempt or in execution. The Court, however, is slow to interfere with the decision of the Justices of the Peace.

Discharge of sureties.

502. All or any sureties for the attendance and appearance of a person released on bail may, at any time, apply to a Magistrate to discharge the bond either wholly or so far as relates to the applicants.

On such application being made, the Magistrate shall issue his warrant of arrest, directing that the person so released be brought before him.

On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so may commit him to custody.

CHAPTER XL.

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES.

When attendance of witness may be dispensed with.

503. Whenever, in the course of an inquiry, a trial or any other proceeding under this Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court, that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance, and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limit of whose jurisdiction such witness resides, to take the evidence of such witness. When the witness resides in the dominions of any Prince or State in alliance with Her Majesty in which there is an officer representing the British Indian Government, the commission may be issued to such officer.

Issue of commission, and procedure thereunder.

The Magistrate or officer to whom the commission is issued, or if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is, or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers as in trials of warrant-cases under this Code.

In Italy, royal princes, high officers of State, and ambassadors (out of the kingdom) are exempt from appearance in Court as witnesses.—Ital. C. P. C., 723—726.

In Germany, if a witness or expert is prevented for a considerable time from appearing owing to illness, infirmity, or other insurmountable obstacle, the Court may send a *Juge d'Instruction* to take his deposition. It is not indispensable that the public minister or the defender of accused should be present. The accused, if in custody, cannot claim to be present, unless the witness is within the jurisdiction of the Court.—Germ. C. P. C., 223.

Commission in case of witness being within Presidency-town.

504. If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to the said Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the thirty-ninth and fortieth of Victoria, chapter 46, section 3.

Parties may examine witness.

505. The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed shall examine the witness upon such interrogatories.

Any such party may appear before such Magistrate or officer by pleader, or, if not in custody, in person, and may examine, cross-examine, and re-examine (as the case may be) the said witness.

Power of Provincial Subordinate Magistrate to apply for issue of commission.

506. Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application; and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

Return of commission.

507. After any commission issued under section 503 or section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto, and the deposition shall be open at all reasonable times to inspection of the parties, and may subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

Adjournment of inquiry or trial.

508. In every case in which a commission is issued under section 503 or section 506, the inquiry, trial, or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

CHAPTER XLI.

SPECIAL RULES OF EVIDENCE.

Deposition of medical witness.

509. The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, may be given in evidence in any inquiry, trial, or other proceeding under this Code, although the deponent is not called as a witness.

Power to summon medical witness.

The Court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.

Report of Chemical Examiner.

510. Any document purporting to be a report under the hand of *any* Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

Previous conviction or acquittal how proved.

511. In any inquiry, trial, or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,—

(*a*) by an extract certified under the hand of the officer having the custody of the records of the Court in which

such conviction or acquittal was had to be a copy of the sentence or order; or

(*b*) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

Held, in Missouri, that the record of the conviction of one of the same name as the defendant raises a presumption of identity, which, if not rebutted, is conclusive.—11 Mo. App., 91. This is a very sensible ruling.

Record of evidence in absence of accused.

512. If it be proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence, or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Under 11 & 12 Vic., c. 42, s. 20, the depositions duly taken of persons since dead or too ill to travel, may be read at the trial of an indictable offence. Pregnancy has been considered to be a sufficient illness under the section.—*R.* v. *Wellings*, 3 Q. B. D., 426; *R.* v. *Goodfellow*, 14 Cox, C. C., 326.

The Indian law requires that the trial must be in presence of the accused person. Consequently the number of absconders is always very large. Their remaining out-of-the-way rather favours their chances of acquittal. In some continental countries an absconding accused may be convicted and sentence passed upon him in his absence. In England, within the metropolitan district, a Metropolitan Magistrate may, by 2 & 3 Vic., c. 71, s. 19, after a summons has been disobeyed and on proof thereof, issue his warrant without requiring any substantiation of any charge against the defendant; and in all cases not of a criminal nature may, if no sufficient cause is shown for the absence of the defendant, hear the case in his absence.

As to trial in the absence of an accused person, see notes under ss. 205, 252, 353. The German Code does not follow the French,

Belgian, and Italian Codes. Except in the cases mentioned in the notes under s. 352, the object of recording depositions against an absent accused is exactly the same as in India, namely, to preserve intact the evidence of the offence. Relatives of the accused may choose a defender, and the witnesses and experts are examined on oath. Meanwhile, a notice is put in some public newspaper, calling on the accused to appear or make known his residence; and in serious cases his goods can be attached.—Germ. C. P. C., Bk. ii, s. 8.

CHAPTER XLII.

PROVISIONS AS TO BONDS.

Deposit instead of recognizance.

513. When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing such bond.

Procedure on forfeiture of bond.

514. Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class;

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person.

Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorize the distress and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate *or Chief Presidency Magistrate* within the local limits of whose jurisdiction such property is found.

If such penalty be not paid and cannot be recovered by such attachment and sale, the persons so bound shall be

liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

"That such bond has been forfeited".—The present Code does not state what amounts to a forfeiture of the bond, but leaves the Magistrate to decide on the merits of each case. In England an act of violence, or to renew a threat of assault to the complainant *or to others* or to be convicted of any offence which in *itself is a breach in law*, is a ground of forfeiture (1 Hawk., c. 60, 20 ; 16 and 17 Vict., c. 30, 2) where the bond has been taken to keep the peace. To steal another man's goods is not necessarily a breach, if no person is put in terror thereby. See s. 121, *supra*.

It has been held in America that a surety is not exonerated by the fact that the principal could not appear without danger of losing his life from mob violence, unless the proper authorities were applied to, and were unable or unwilling to extend to the accused the protection necessary to enable him to appear.—79 Ky., 582.

Appeals from, and revision of, orders under section 514.

515. All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate shall be appealable to the District Magistrate, or if not so appealed, may be revised by him.

Power to direct levy of amount due on certain recognizances.

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

Order for disposal of property regarding which offence committed.

517. When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

When an order is made under this section in a case in which an appeal lies, such order shall not (except when the property is livestock or is subject to speedy and natural decay) be carried out until the period allowed for presenting such appeal has passed, or when such appeal is presented within such period, until such appeal has been disposed of.

EXPLANATION.—In this section the term 'property' includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

When any prisoner is convicted of larceny or other offence which includes the stealing of any property, and the prisoner has sold the stolen property to some person who had no knowledge that the same was stolen, and any moneys have been taken from the prisoner on his apprehension, the Court may, on the application of such purchaser and on the restitution of the stolen property to the prosecutor, order that out of such moneys a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser.—Steph. Dig., C. P., 333.

As to the explanation to this section, it has been held in England, under 24 & 25 Vict., c. 96, s. 100, that the Court has jurisdiction to entertain an application for the restitution of the proceeds of the property as well as of the property itself; but that such an applition ought only to be granted if the proceeds are in the hands of the convict or of an agent who holds them for him.—*R.* v. *Central Criminal Court* (*Justices*), 17 Q. B. D., 598. It does not appear to be necessary in England that the property should be produced before the Court. See s. 519, *infra*, which contains a very wide provision as to the appropriation of any money found on the accused.

Order may take form of reference to District or Subdivisional Magistrate.

518. In lieu of itself passing an order under section 517 the Court may direct the property to be delivered to the District Magistrate or to a Subdivisional Magistrate, who shall in such cases deal with it as if it had been seized by the police, and the seizure had been reported to him in the manner hereinafter mentioned.

Payment to innocent purchaser of money found on accused.

519. When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person has

bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

"The person entitled to the possession thereof".—The general rule of English law is that, *except by sale in market overt*, no one can acquire a title to a personal chattel from any one but the owner. The case of *Miller v. Race* (Smith's Leading cases) has established an exception in the case of negotiable instruments. The rule of the civil law is—"Id quod nostrum est sine facto nostro ad alium transferri non potest"—Paulus—"what is ours, cannot without an act of ours, be transferred to another." But in the case of *Clarke* v. *Shee* (Cowper, 179) Lord Mansfield held that the money and notes must have come *bona-fide* into a third person's hands.

Stay of order under section 517, 518 or 519.

520. Any Court of appeal, confirmation, reference or revision, may direct any order under section 517, section 518 or section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter, or annul such order.

Destruction of libellous and other matter.

521. On a conviction under the Indian Penal Code, section 292, section 293, section 501, or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

The Court may, in like manner, on a conviction under the Indian Penal Code, section 272, section 273, section 274 or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had to be destroyed.

Article 29 of the Louisana Procedure Code is as follows: "On a conviction for libel or publication against morals and decency, the Court *shall* order all the copies of the publication; and which remain in the hands of the defendant, to be *seized* and destroyed; and if it shall appear that, after the commencement of the prosecution was notified to the defendant, he shall have sold or circulated any copies of such publication, he shall suffer the maximum of the punishment assigned to the offence."

"The Court may, on a conviction under &c."—Under section 423 of the French Penal Code, the Court of Cassation has ruled that, if the things are harmful to health, they ought to be confiscated and destroyed, *even though the accused has been acquitted* owing to his good faith.—Cass., 3rd January 1857; 12th July, 1860. This is a very sensible ruling, and the Indian Code might be altered accordingly. It is very curious to note how continental and American rulings give effect to the intention of the Legislature even when not expressed, whereas in India penal statutes are often construed so strictly and illiberally, that the intention of the Legislature is defeated.

Article 40 of the German Penal Code permits the confiscation of articles gained by crime, or used in the commission of a crime; Article 41 authorizes the destruction of writings, pictures, copies, &c., which constitute an offence. The Indian Code is inadequate, as it only authorizes the destruction of copies "which are in the custody of the Court, or remain in the possession or power of the person convicted." The German Code authorizes destruction of all copies which may be found in the possession of the author, printer, editor, or bookseller, and copies publicly exposed and offered for sale. The Indian Code authorizes destruction only "on a conviction;" but Article 42 of the German Code permits it, when a prosecution is impossible (for instance, owing to the absence of the offender). Moreover, the German Code authorizes destruction of a portion of a writing or picture, if destruction is possible. When confiscation, destruction, &c., of delictuous objects can be ordered independently of a prosecution, such order may be given on the application of the public minister or the private accuser by the Court which would have jurisdiction to try the offender.—Germ. C. P. C., 477.

See s. 53, which does not distinctly state whether weapons found on an accused may be confiscated. This is provided for in the German Penal Code, 40. Article 41 of the same Code provides for the destruction of writings, pictures, imitations, or reproductions, together with the plates, &c. If the writing or picture be only *partly* criminal, and a destruction is possible, only the delictuous passages or portions need be destroyed or effaced. Such orders may be passed even when there has been no conviction and no prosecution.—*Id.*, 42. So in the case of counterfeit coin (152): in the case of illegal hunting or sport, guns, prey, dogs, snares, nets, traps, &c., can be confiscated (295): in the case of the contraventions specified in Article 360, the plans of fortresses and fortifications may be confiscated: also the arms, stamps, engravings, plates, &c., and the money found on the gambling tables, whether belonging to the accused or not; in the case of certain contraventions under Article 367, the food and drink, prohibited arms, &c.; also false weights and measures under Article 369 (2).

Power to restore possession of immoveable property.

522. Whenever a person is convicted of an offence attended by criminal force, and it appears to the Court that, by such force, any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, order such person to be restored to the possession of the same.

No such order shall prejudice any right or interest to or in such immoveable property which any person may be able to establish in a civil suit.

Even when a person had the right to the land he seized upon, the Roman Law considered the trespass an offence, for which it exacted redress, and it replaced the parties in their original position. It would not allow a man to gain any benefit by his tortious act. Hawkins, the English text writer, says that a party may enter by force into that to which he has a legal title: thereby making each man the judge in his own cause, if he is rich and powerful enough to take immediate possession; thus exposing the public peace to constant jeopardy. "And this," says Phillimore, "in a country where, at the time he wrote, to cut down the bank of a pond, or a young tree worth a shilling, was a capital felony". "Bona fides tantumdem possidenti præstat quantum veritas, quoties lex impedimento non est"—Paulus—good faith gives the possessor the same rights as a valid title, where the law has not otherwise provided: As to what is 'bona fides', this must be coupled with the maxim, "non videtur possessionem adeptus, qui ita nactus est ut eam retinere non potest." The Code of Louisiana distinguishes between the case where possession is changed, with and without the consent of the possessor.

Procedure by police upon seizure of property taken under section 51 or stolen.

523. The seizure by any Police-officer of property taken under section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

Procedure where owner of property seized unknown.

If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it, and shall, in such case, issue a proclamation, specifying the articles of which such property consists, and requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation.

Procedure where no claimant appears within six months.

524. If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show

that it was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate, or Subdivisional Magistrate or of a Magistrate of the first class empowered by the Local Government in this behalf.

In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie.

Power to sell perishable property.

525. If the person entitled to the possession of such property is unknown or absent, and the property is subject to speedy and natural decay, or the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, the Magistrate may at any time direct it to be sold; and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

High Court may transfer case, or itself try it.

526. Whenever it is made to appear to the High Court—

(*a*) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(*b*) that some question of law of unusual difficulty is likely to arise, or

(*c*) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or

(*d*) that an order under this section will tend to the general convenience of the parties or witnesses; *or*

(*e*) *that such an order is expedient for the ends of justice, it may order*—

(1) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence;

(2) that any particular criminal case or appeal, or class of such cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction; or

(3) that any particular criminal case or appeal be transferred to and tried before itself: *or*

(4) *that an accused person be committed for trial to itself or to a Court of Session.*

When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

Every application for the exercise of the power conferred by this section shall be made by motion which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation.

When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.

Notice to public prosecutor of application under this section.

Every accused person making any such application shall give to the public prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

Nothing in this section shall be deemed to affect any order made under section 197.

The provisions of this section have been somewhat abused in India. Even complainants and witnesses have been allowed to make applications for transfer of cases, without any notice to the public prosecutor. In Italy an accused, who is found to have made such an application without sufficient grounds, is liable to a fine of 300 francs, without prejudice to the right of the Judge or Magistrate to demand reparation for the insult and damages.—Ital. C. P. C., 760. If a party making such an application is called on to prove his allegations by witnesses, they are heard with closed doors.

A case may in Italy be transferred from one Court to another on grounds of public safety or of legitimate suspicion. A demand on the former ground can only be made by the public minister; in the latter case, by the accused as well or by the civil party. In such cases the order of the Court shall assign no reason, and the order can only be passed by the Court of Cassation.—Ital. C. P. C., 766, 767.

The first part of this section enacts the effect of 16 Vict., c. 30, ss. 4 and 5; 5 and 6, Will. 4, c. 33, s. 3; and 5 and 6 W. and M., c. 11, s. 2. In England, the Attorney-General, acting on behalf of the Crown, may, as of right, demand a writ of *certiorari* for the removal into the High Court of Justice (Queen's Bench Division) of any

indictment or inquisition in order to its being tried before the said Court, either at bar or at *nisi prius*.—Steph. Dig., C. P. C., 90.

In France, the Court of Cassation can transfer a case from one Court to another "pour cause de sûreté publique ou de suspicion légitime," at the request of the *procureur-général*, and on the latter ground only at the request of the parties.—C. P. C., 542. It is a ground for transfer, if there are likely to be scenes of disorder.—Cass., 16th January 1846, *et al.*; or when the jury is likely to be influenced by the ardour of local feeling.—Cass., 13th April 1853. A demand for transfer does not oblige a competent Court to suspend proceedings pending the result of such application. In such a case a Court is not to suspend proceedings unless and until it gets an order to that effect from the Court of Cassation.—Cass., 3rd August 1838. The rejection of an application for transfer does not prevent a new application made on new and subsequent grounds.—C. P. C., 552.

The prosecutor of any indictment, and the person charged or intended to be charged by any indictment or inquisition, may move the Queen's Bench Division of the High Court or any Judge of the High Court for a writ of *certiorari* to remove into that Court any indictment from any other Court. The person moving must make it appear that a fair and impartial trial of the case cannot be had in the Court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises, or (in cases of misdemeanour) a special jury may be required.—Steph. Dig., C. P. C., 91.

No *certiorari* can be granted unless the prosecutor or the defendant, as the case may be, enters into recognizances to pay, according as there may be acquittal or conviction, costs incurred by the other party subsequent to the removal of the indictment.

The grounds for transfer appear to be wider in India than in England. Clause (e), which was added by Act III of 1884, seems to give too much discretion to the High Court. In England inability to obtain a fair trial is the only ground for a charge of venue. 13 L. T., 365. Inconvenience or difficulty in securing the attendance of the defendant's witnesses is no ground.—*R.* v. *Cavendish*, 2 Cox, C. C., 176. Evidence of partiality must be extremely strong to induce the Court to change the venue in a criminal information.—*R.* v. *Harris*, 3 Burr., 1330. It is no reason for changing the venue in an indictment for a conspiracy in destroying foxes and other noxious animals, that the gentry of the country in which the indictment was found are addicted to fox-hunting.—*R.* v. *King*, 2 Chit., 217. In felony, the Court refused to allow the defendant to enter a suggestion for changing the venue on the ground of prejudice pervading the county.—*R.* v. *Penpraze*, 1 N and M., 312. But where large numbers of the jurors who would try the case were members of an association called "The Land League," which had subscribed to the defence of the prisoners, the crime being of an agrarian nature, the venue was changed.—*R.* v. *Phelan*, 14 Cox, C. C., 579.

Adjournment on application under section 526.

526*A*. If, in any criminal case or appeal, before the commencement of the hearing, the public prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending

his intention to make an application under section 526 in respect of the case, the Court shall exercise the powers of postponement or adjournment given by section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal.

This section is added by s. 12, Act III of 1884. It has the effect of allowing a guilty accused to gain time for tampering with witnesses, &c. In one case it was wrongly applied by the Calcutta High Court to proceedings for keeping the peace, in which the person proceeded against is not an accused person. The section was not required, and it has done much harm to the administration of justice. The High Court issue a rule, which comes on for hearing after some time. So the case gets stale, and a well-to-do accused has a greater chance of escaping.

Power of Governor-General in Council to transfer criminal cases and appeals.

527. The Governor-General in Council may, by notification in the *Gazette of India*, direct the transfer of any particular criminal case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses.

The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court.

District or Subdivisional Magistrate may withdraw or refer cases.

528. Any District Magistrate or Subdivisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

Power to authorize District Magistrate to withdraw classes of cases.

The Local Government may authorize the District Magistrate to withdraw from the Magistrates subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

A Magistrate making an order under this section shall record in writing his reason for making the same.

CHAPTER XLV.

OF IRREGULAR PROCEEDINGS.

Irregularities which do not vitiate proceedings.

529. If any Magistrate not empowered by law to do any of the following things, namely,—

(*a*) to issue a search-warrant under section 98;

(*b*) to order, under section 155, the police to investigate an offence;

(*c*) to hold an inquest under section 176;

(*d*) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;

(*e*) to take cognizance of an offence under section 191, clause (*a*) or clause (*b*);

(*f*) to transfer a case under section 192;

(*g*) to tender a pardon under section 337 or section 338;

(*h*) to sell property under section 524 or section 525; or

(*i*) to withdraw a case and try it himself under section 528;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

Irregularities which vitiate proceedings.

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely,—

(*a*) attaches and sells property under section 88;

(*b*) issues a search-warrant for a letter in the Post Office, or a telegram in the Telegraph Department;

(*c*) demands security to keep the peace;

(*d*) demands security for good behaviour;

(*f*) discharge a person lawfully bound to be of good behaviour;

(*r*) cancels a bond to keep the peace;

(*g*) makes an order under section 133 as to a local nuisance;

(*h*) prohibits under section 143 the repetition or continuance of a public nuisance;

(*i*) issues an order under section 144;

(*j*) makes an order under Chapter XII;

(*k*) takes cognizance under section 191, clause (*c*), of an offence;

(*l*) passes a sentence under section 349, on proceedings recorded by another Magistrate;

(*m*) calls under section 435, for proceedings;

(*n*) makes an order for maintenance;

(*o*) revises under section 515, an order passed under section 514;

(*p*) tries an offender;

(*q*) tries an offender summarily; or

(*r*) decides an appeal;

his proceedings shall be void.

"Tries an offender summarily."—When a Magistrate, invested with summary powers, tries a case summarily, which is not triable summarily, the Appellate Court should send back the case for re-trial. Kyshe, Straits Settlements Rep., iii, 99.

Proceedings in wrong place.

531. No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial, or other proceeding in the course of which it was arrived at or passed took place in a wrong Sessions Division, District, Subdivision, or other local area, unless it appears that such error occasioned a failure of justice.

When irregular commitments may be validated.

532. If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court the Court, to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment, and direct a fresh inquiry by a competent Magistrate.

Non-compliance with provisions of section 164 or 364.

533. If any Court before which a confession or other statement of an accused person recorded under section 164 or section 364 is tendered in evidence finds that the provisions of such section have not been fully complied

with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

Omission to ask question prescribed by section 454, clause 2.

534. An omission to ask any person whether he is an European British subject in a case to which the second clause of section 454 applies shall not affect the validity of any proceeding.

Effect of omission to prepare charge.

535. No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has been occasioned thereby.

If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge shall be framed, and that the trial be re-commenced from the point immediately after the framing of the charge.

Trial by jury of offence triable with assessors.

536. If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.

Trial with assessors of offence triable by jury.

If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.

Finding or sentence when reversible by reason of error or omission in charge or other proceedings.

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction, shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

of the want of any sanction required by section 195, or

of the omission to revise any list of jurors or assessors in accordance with section 324, or

of any misdirection in any charge to a jury; unless such error, omission, irregularity, want or misdirection has occasioned a failure of justice.

In Italy, the non-observance of forms which the Code of Criminal Procedure prescribes under pain of nullity (à peine de nullité) invalidates the act and all subsequent acts which depend on it, provided the nullity has not been, or cannot be waived by the silence of the parties.—Ital. C. P. C., 849. If the form or procedure is not prescribed under pain of nullity, no effect follows.

"Nothing so much fosters the growth of crimes as the hope in the culprit that some defect of form will enable him to escape; and nothing encourages that hope so much as the numerous and sometimes frivolous objections that are allowed; and this is called the tenderness and humanity of the law?—when, in fact, it is, in the words of Sir Matthew Hall, its "greatest blemish and inconvenience."

Sec. 1045 of the New York Criminal Procedure Code is as follows: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. The provisions of this code and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice." The Commissioners of the Code aptly remark: "This section is proposed for the purpose of abrogating a distinction which has in it no principle of substantial justice, and whose highest aim, practically considered, seems to be to render the law inconsistent with its spirit, and as a consequence absurd and ridiculous. The rule applicable to ordinary statutes is that they are to be so construed as to give effect to the will of the legislature, as either expressed in the language of the statute itself, or as deducible from the fair and reasonable import of its terms, its object, the evil to be remedied, and the circumstances under which it was passed." It is a great pity that Indian Judges sometimes drag in English rules which are quite antagonistic to the spirit of Indian Criminal Procedure.

The Louisiana Criminal Procedure Code lays down seven objects; one of these is to abolish all forms, that produce vexation to the prosecutor, to the accused, or to the witnesses. Another is to *take away from the guilty all hope of escape by a resort to formal or technical objections.* Article 3 states that "the great object of penal law is the prevention of offences by the example of punishment, the intent of all Codes of Procedure is to insure this end; therefore, every system must be imperfect which permits the form to defeat the substance of the law, and *suffers a criminal ever to escape punishment from any defect* of form in his prosecution." These words should be posted up in the Courts of all Judicial Officers and committed to memory by them.

Article 571 of the Louisiana Criminal Procedure Code is as follows:—"No omission of any matter of form, prescribed by this system, nor any departure from the forms given for proceeding under it, shall render the proceeding void, unless it be so specially provided; or unless the departure from the form has caused some injury to the party complaining of it." The Indian law is even wider, as the words "failure of justice" are used instead of injury. Section 530 gives an exhaustive list of irregularities which vitiate proceedings.

538. No distress made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, writ of distress or other proceedings relating thereto.

Distress not illegal, nor distrainer a trespasser for defect or want of form in proceedings.

CHAPTER XLVI.

MISCELLANEOUS.

539. Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in Chancery in England or Ireland, or any Magistrate authorized to take affidavits or affirmations in Scotland.

Courts and persons before whom affidavits may be sworn.

540. Any Court may, at any stage of any inquiry, trial, or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Power to summon material witness, or examine person present.

On an indictment for knowingly receiving stolen goods, the prisoner's account was that he had purchased them of a tradesman in the same town. Other circumstances in the case tended to negative this account, though the tradesman was not called for the prosecution :—*Held*, that it was not necessary to call him on the part of the prosecution, there being other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story.—*Reg.* v. *Ritson*, 50 L. T., 727. Such a witness could only be essential, if the Court had any doubt as to the truth of the allegation.

541. Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned

Power to appoint place of imprisonment.

or committed to custody under this Code shall be confined.

As to transportation, see Act IX, 1882.

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail.

541A. (1) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(2) When a person is removed to a criminal jail under sub-section (1), he shall, on being released therefrom, be sent back to the civil jail, unless either—

(*a*) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under section 342 of the Code of Civil Procedure; or

(*b*) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under section 341 of the Code of Civil Procedure.

Added by Act X, 1886, s. 15.

Power of Presidency Magistrate to order prisoner in jail to be brought up for examination.

542. Notwithstanding anything contained in the Prisoners' Testimony Act, 1869, any Presidency Magistrate desirous of examining, as a witness or an accused person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

The officer so in charge, on receipt of such order, shall act in accordance therewith, and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.

Interpreter to be bound to interpret truthfully.

543. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

Expenses of complainants and witnesses.

544. Subject to any rules made by the Local Government with the previous sanction of the Governor-General in Council, any Criminal Court may order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial, or other proceeding before such Court under this Code.

In Germany, if an accused be convicted, he has to bear the expense of the preliminary investigation (preparation of the public accusation) and of the execution of the punishment.—Germ. C. P. C., 497. If the accused be acquitted, he cannot be made to pay costs, except if they were occasioned by his negligence, ex. gr., when a case has had to be postponed owing to his non-appearance.—*Id.*, 499.

Power of Court to pay expenses or compensation out of fine.

545. Whenever under any law in force for the time being, a Criminal Court imposes a fine or confirms in appeal, revision or otherwise, a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(*a*) In defraying expenses properly incurred in the prosecution;

(*b*) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit.

If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

"Compensation for the injury caused by the offence committed." Compensation can be given to any person who has suffered injury. In Italy, any person who has suffered harm or damage from an offence can make himself a civil party in the penal action, although he has not made a complaint.—Ital. C. P. C., 109.

In England, compensation given by a Magistrate is sometimes a bar to subsequent proceedings in the county court, *e. g.*, where compensation is given under 6 and 7 Vic., c. 86, s. 28, for injuries caused by furious driving.—*Wright* v. *London General Omnibus Co.*, 20 W. N. (May 19th 1877). So a summary conviction under 24 and 25 Vic., c. 100, ss. 42, 43, for assaulting a married woman is, under s. 45 of that Act, a bar to a subsequent civil action by the husband for consequential damage.—*Masper* v. *Brown*, 1 C. P. Div., 97.

In France, when a minor under 16 is acquitted on the ground that he has acted without understanding (discernement), the Court may nevertheless condemn him, along with his father or guardian, to pay

the costs.—Cass., 10th June 1842; 26th March 1858, *et aliunde.* This is a very just and sensible provision. In France, the civil action can be pursued before the same Judges and at the same time as the public action (C. P. C., 3); but a withdrawal of the former cannot stop the latter. Where the injured person has instituted a separate civil action, judgment on it must be suspended until the criminal case has been decided. He who first chooses the civil remedy cannot afterwards prosecute in the correctional Court.—Cass., 9th May 1828; 13th August 1835; 11th June 1846. The maxim "Electâ unâ viâ, non datur recursus ad alteram," applies, when the two demands made by the same person and between the same parties have at once the same cause and the same object.—Cass., 10th November 1851; 16th November 1861, *et aliunde.* See notes uder s. 204.

In England, the Court has refused, after conviction on an indictment for an assault, to sentence a party, while an action for the same assault was pending.—(*R.* v. *Mahon*, 4 A. and E., 575.)

In England, where any person has been active in or towards the apprehension of any person charged with murder and other heinous offences, the Court may order the Sheriff of the county to pay him reasonable compensation, but a Court of Quarter Sessions cannot grant more than £5, unless the offence be receiving stolen property.

If any man happens to be killed in endeavouring to apprehend any person who is charged with any such offences, the Court before whom such person is tried may order the Sheriff of the county to pay to the widow of the man so killed, in case he was married, or to his child or children, in case his wife is dead, or to his father or mother, in case he left neither wife nor child, such sum of money as to the Court seems meet.

On the conviction of any person for felony, the Court may award a sum not exceeding £100 by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony.—Steph. Dig., C. P., 329—332.

Payments to be taken into account in subsequent suit.

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545.

Moneys ordered to be paid recoverable as fines.

547. Any money (other than a fine), payable by virtue of any order made under this Code, shall be recoverable as if it were a fine.

Copies of proceedings.

548. If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury, or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith: Provided that he pay for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

"At any time *after all the examinations of witnesses are completed*, and before the first day of the Assizes or Sessions, the person committed is entitled to have copies of the depositions on payment of a reasonable sum for the same, not exceeding three-half pence for each folio of ninety words."—Steph. Dig., C. P. C., 126.

The law as to giving copies to accused seems to be more liberal in India than in England. In England, an accused, who has been committed by a Justice, may get a copy of the depositions.—11 and 12 Vic., c. 42, s. 27; 6 and 7 Will. IV., c. 114, s. 3. This rule, however, is not applicable to every case of imprisonment, but only to commitments for indictable offences.—*R.* v. *Humphreys*, 19 L. J. M. C., 189; *R.* v. *London*, 5 Q. B., 555. Moreover, an accused can only get copies after he has been committed.—*Id.* In India, an accused is not entitled to copies of depositions while a trial is going on, but only after conviction or commitment. Copies, however, are generally given.

Delivered to Military authorities of persons liable to be tried by Court-Martial.

549. The Governor-General in Council may make rules, consistent with this Code and the Army Act, 1881, or any similar law for the time being in force, as to the cases in which persons subject to Military law shall be tried by a Court to which this Code applies or by Court-Martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, 1881, section 14, to be tried by a Court-Martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him together with a statement of the offence of which he is accused, to the Commanding Officer of the regiment, corps or detachment to which he belongs, or to the Commanding Officer of the nearest military station, for the purpose of being tried by Court-Martial.

Apprehension of such persons.

Every Magistrate shall, on receiving a written application for that purpose by the Commanding Officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

Powers of superior officers of police.

550. Police-officers superior in rank to an officer in charge of a Police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

Power to compel restoration of abducted females.

551. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under

the age of fourteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

This section and section 100(*vide supra*) empower Magistrates to issue what are equivalent to writs of *habeas corpus* or *homine replegiando*. Paterson remarks that the former writ meets all kinds of restraint of liberty by any authority whatsoever, and is sometimes resorted to by wives; or by parents to recover possession of children. In the case of Earl Ferrers, in 1758, Lady Ferrers, through her brother, obtained a writ of *habeas corpus* against the Earl, under which she was brought into Court, and then was allowed to exhibit articles of the peace against him for his violent conduct.—*R.* v. *Ferrers*, 1 Burr., 6. And in the case of another wife brought up, on its being proved that she was cruelly ill-used, the Court allowed her to go where she pleased.—*R.* v. *Gregory*, 4 Burr., 1991. In another case, in 1758, Wilkes obtained a *habeas corpus* to bring up his wife, who was alleged to be kept from him and in restraint, by her mother, but on the wife being brought into Court, and satisfying the Judge, that she was living apart under articles of separation, and was not against her will restrained by any one, she was left to return to her mother's house.—*R.* v. *Mead*, 1 Burr., 542. And in 1761, where a wife was alleged to be confined by her husband's order in a mad house, she was examined by order of the Court, as well as brought up, and on her being certified sane, she was at once released.—*R.* v. *Turlington*, 2 Burr., 1115. A *habeas corpus* is also the usual mode of a parent recovering possession of a child who is in the custody of the other parent; or as between parents or guardians and third parties when there is any wrongful custody.—*R.* v. *Greenhill*, 4 A. and E., 624.

If the woman be above the age of 14 years, the Magistrate can only order that she be restored *to her liberty*. He cannot direct her, much less compel her, to go back to her husband or any other relative.

The word unlawful appears to be wider than 'illegal.' See ss. 23, 43, 80, P. C., &c. See notes under s. 361, P. C.

Compensation to person groundlessly given in charge in Presidency-town.

552. Whenever any person causes a Police-officer to arrest another person in a Presidency-town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation not exceeding fifty rupees, to be paid by the person so causing the arrest to the person so arrested for his loss of time and expenses in the matter, as the Magistrate thinks fit.

In such cases, if more persons than one are arrested or complained against, the Magistrate may, in like manner,

award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

There is no reason why the provisions of this section should not be extended to all cases and all Magistrates. Indeed, it would be a good thing to do so, having regard to the numerous technical pitfalls placed in the way of convictions under s. 211, Penal Code.

Power of chartered High Courts to make rules for inspection of records of subordinate Courts.

553. With the previous sanction of the Governor-General in Council, the High Court at Fort William, and, with the previous sanction of the Local Government, any other High Court established by Royal Charter may, from time to time, make rules for the inspection of the records of subordinate Courts.

Power of other High Courts to make rules for other purposes.

Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,

(*a*) make rules for keeping all books, entries, and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts;

(*b*) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided;

(*c*) make rules for regulating its own practice and proceedings, and the practice and proceedings of all Criminal Courts subordinate to it; and

(*d*) make rules for regulating the execution of warrants issued under this Code for the levy of fines:

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

All rules made under this section shall be published in the local official Gazette.

Forms.

554. Subject to the power conferred by section 553, and by the twenty-fourth and twenty-fifth of Victoria, chapter 104, section 15,

the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

Case in which Judge or Magistrate is personally interested.

555. No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

EXPLANATION.—A Judge or Magistrate shall not be deemed to be a party or personally interested, within the meaning of this section, to or in any case, merely because he is a Municipal Commissioner.

"Those who are dissatisfied with the existing system of administration in country districts, declare that there can be no guarantee of impartial justice where the Judges are personally acquainted with the parties, and where the same persons practically do duty as Judges and prosecutors. All country Justices are *ex officio* guardians of the Union in which they reside; the Chairman of the Board of Guardians being, perhaps, usually a squire. The same individual who hears from the clerk of the Guardians the particulars about a defaulter charged with neglect of his relatives, and orders the defaulter in question to be prosecuted, may as a Justice in a few days be sitting in judgment on him. Again, it is urged, the Justices, being country gentlemen and game preservers, have a direct interest in putting down poaching. But recent legislation (the objection continues) has recognised the inexpediency of allowing Magistrates to adjudicate in special cases in which they have a class interest. Thus, no mill-owner can hear a charge under the Factory Acts; no mine-owner under the Mines Inspection Act: no miller can adjudicate under the Bread and Flour Act: no brewer and distiller can take part in the granting of licenses. Why, then, should game preservers try game stealers? This, it is said, is an anomaly; and it is an anomaly which causes a suspicion of, and disrespect for, what is sometimes stigmatised as 'Justice's justice' in the rural mind." Escott's People and Polity.

"Personally interested", "in which he has any interest, or to which any of his ascendants or descendants, or any collateral relation, either by consanguinity or affinity, within the third degree, are parties, or are anywise interested."—Lou. P. C., 146.

In order to disqualify a Justice of the Peace, it is not sufficient to show that, as a member of the town council, he has a pecuniary interest in the result of the information or complaint, or that the corporation of which he is a member are the prosecutors; but it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.—*Reg.* v. *Gibbon* (6 Q. B. D., 168) disapproved.—*Reg.* v. *Handsley*, 8 Q. B. D., 383. A Justice of the Peace is not precluded

from adjudicating on a summons under the Act for Prevention of Cruelty to Animals, merely because he is a subscriber to the Royal Society for Prevention, &c.—*Reg.* v. *Deal* (Mayor), 45 L. T., 439.

In England, Justices may not adjudicate on a question in which they are personally interested, provided the nature of the disqualifying interest is such as to throw any doubt upon their impartiality. Mere possibility of bias does not disqualify a Justice from adjudicating. For instance, they are not disqualified by being trustees to persons who have lent money to one of the persons in contention before the Court.—*R.* v. *Rand*, L. R., 1 Q. B., 230. Nor is a Justice disqualified from adjudicating upon proceedings arising out of common rights, merely because he is himself a commoner, at least where the defendant is also a commoner,—*even although he has also made an affidavit in favour of the side for which he afterwards adjudicates.*—*R.* v. *Alcock*, 37 L. T., N. S., 829 (Q. B.) So where Justices who, as members of the town council, had passed an order under 34 and 35 Vic., c. 56, sat to hear a complaint of non-observance of the order: it was held, that they had not such an interest in the subject-matter as would oust their jurisdiction.—*Reg.* v. *Justices of Huntingdon*, 4 Q. B. D., 522. It has been held under 8 Vic., c 18, s. 39 (Lands Clauses Consolidation Act, 1845) that a Sheriff is not disqualified from presiding at a compensation case by holding shares in a company with which a railway company, being one of the parties concerned, is, by an executory agreement not yet carried out, to be amalgamated—.*R.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, L. R., 2 Q. B., 336; Cox, M. C., 380. But, on the other hand, shareholders in a railway company have been held to be disqualified by their interest (however slight) from adjudicating on the case of a man charged with travelling on the line, in which they were interested, with an improper ticket.—*R.* v. *Hammond*, 9 L. T., N. S., 423 (Q. B.). Objections to the jurisdiction on the ground of interest ought to be made at once; otherwise, a party might take the chance of a decision in his favour by Justices who ought not to adjudicate, and then, if he were disappointed, challenge their right to decide.—*Wakefield Local Board of Health* v. *W. M. and Great Grimsby Rail Co.*, L. R., 1 Q. B., 84. This is very important. In India, objections are often allowed, though not taken in the Lower Courts.

In Germany, a Judge is incompetent to take any part in the trial of a case, if (1) he has been personally injured by the punishable act, or (2) is connected by marriage with the accused or his victim, or has been the guardian of either, or (3) related to either within three degrees, or (4) has previously, in the same case, exercised the functions of public minister, police-officer, or advocate, or (5) has been examined as a witness or expert. Objection may be made on the above grounds, and also if there are grave reasons for doubting impartiality.—Germ. C. P. C., 22, 24.

Power to decide language of Courts.

556. The Local Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter.

Powers of Governor-General in Council and Local Government exercisable from time to time.

557. All powers conferred by the Code on the Governor-General in Council or on the Local Government may be exercised from time to time as occasion requires.

Pending cases.

558. The provisions of this Code shall apply, so far as may be, to all cases pending in any Criminal Court when this Code comes into force.

Officers concerned in sales not to purchase or bid for property.

559. A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property.

This section is added by s. 16, Act X of 1886. See s. 169 P. C.

SCHEDULE I.

ENACTMENTS REPEALED.

(a.)—Statute.

Year, reign and chapter.	Title.	Extent of repeal.
13 Geo. III, chapter 63	An Act for establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe.	Section 38.

(b.)—Acts of the Governor-General in Council.

Number and year.	Subject.	Extent of repeal.
XXIII of 1840 ...	Execution of process ...	So much as has not been repealed.
XLV of 1860 ...	Penal Code ..	The illustrations to section 214.

ENACTMENTS REPEALED.—(*Continued.*)

(*b.*)—*Acts of the Governor-General in Council.*—(Continued.)

Number and year.	Subject.	Extent of repeal.
V of 1861 ...	Police Act ...	Section 6 and the last nine words of section 24. Section 35, down to and including the words 'Provided that.'
XVIII of 1862 ...	Criminal Procedure, Supreme Courts.	So much as has not been repealed.
VI of 1864 ...	Whipping ...	Section 7.
II of 1869 ...	Justices of the Peace ...	So much as has not been repealed.
XXII of 1870 ...	Application to European British subjects of Acts conferring summary jurisdiction.	So much as has not been repealed.
IV of 1872 ...	Punjab Laws ..	So far as it relates to Bengal Reg. XX of 1825.
X of 1872 ...	The Code of Criminal Procedure.	So much as has not been repealed.
XI of 1874 ...	Amending the Code of Criminal Procedure.	The whole.
XV of 1874 ...	Laws Local Extent ...	So far as it relates to Bengal Reg. XX of 1825.
X of 1875 ...	High Courts' Criminal Procedure.	The whole Act, except section 144 and so much of section 146 as relates to informations.

ENACTMENTS REPEALED.—(*Concluded.*)

(*b.*)—*Acts of the Governor-General in Council.*—(Concluded.)

Number and year.	Subject.	Extent of repeal.
XX of 1875 ...	Central Provinces Laws...	So far as it relates to Bengal Reg. XX of 1825.
XVIII of 1876 ...	Oudh Laws ..	Ditto.
IV of 1877 ...	Presidency Magistrates...	The whole Act, except section 57.
XXI of 1879 ...	Extradition ...	Chapter III.
X of 1881 ...	Coroners ...	Sections 8 & 9.

(*c.*)—*Regulations.*

Number and year.	Subject.	Extent of repeal.
Bengal Regulation XX of 1825.	Jurisdiction of Courts-Martial.	So much as has not been repealed.
III of 1872 ...	Santhal Parganas Settlement.	So far as it relates to Act X of 1872.
IX of 1874 ...	Arakan Hills District Laws	So far as it relates to Acts II of 1869, X of 1872 and XI of 1874.
III of 1877 ...	Ajmer Laws ...	So far as it relates to Bengal Regulation XX of 1825.

(*d.*)—*Act of the Governor of Fort St. George in Council.*

Number and year.	Subject.	Extent of repeal.
VIII of 1867 ...	Police	Section 9.

SCHEDULE III.

Ordinary Powers of Provincial Magistrates.

I.—Ordinary Powers of a Magistrate of the Third Class.

(1) Power to arrest, or direct the arrest in his presence of, an offender, section 65.

(2) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, sections 83, 84, and 86.

(3) Power to issue proclamations in cases judicially before him, section 87.

(4) Power to attach and sell property in cases judicially before him, section 88.

(5) Power to restore attached property, section 89.

(6) Power to issue search-warrant, section 96.

(7) Power to endorse a search-warrant and order delivery of thing found, section 99.

(8) Power to record statements or confessions during a police investigation, section 164.

(9) Power to authorize detention of a person during a police investigation, section 167.

(10) Power to detain an offender found in Court, section 351.

(11) Power to sell perishable property of a suspected character, section 525.

II.—Ordinary Powers of a Magistrate of the Second Class.

(1) The ordinary powers of a Magistrate of the third class.

(2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, section 155.

III.—Ordinary Powers of a Magistrate of the First Class.

(1) The ordinary powers of a Magistrate of the second class.

(2) Power to issue search-warrant otherwise than in course of an inquiry, section 98.

(3) Power to issue search-warrant for discovery of persons wrongfully confined, section 100.

(4) Power to require security to keep the peace, section 107.

(5) Power to require security for good behaviour, section 109.

(6) Power to make orders, &c., in possession cases, sections 145, 146, and 147.

(7) Power to commit for trial, section 206.

(8) Power to stop proceedings when no complainant, section 249.

(9) Power to make orders of maintenance, sections 488 and 489.

IV.—Ordinary Powers of a Sub-divisional Magistrate.

(1) The ordinary powers of a Magistrate of the first class.
(2) Power to direct warrants to landholders, section 78.
(2a*) Power to require security for good behaviour, section 110.
(3) Power to make orders as to local nuisances, section 133.
(4) Power to make orders prohibiting repetitions of nuisances, section 143.
(5) Power to make orders under section 144.
(6) Power to hold inquests, section 174.
(7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186.
(8) Power to entertain complaints, section 191.
(9) Power to receive police reports, section 191.
(10) Power to entertain cases without complaint, section 191.
(11) Power to transfer cases to a Subordinate Magistrate, section 192.
(12) Power to pass sentence on proceedings recorded by a Subordinate Magistrate, section 349.
(13) Power to sell property alleged or suspected to have been stolen, &c., section 524.
(14) Power to withdraw cases other than appeals, and to try or refer them to trial, section 528.

V.—Ordinary Powers of a District Magistrate.

(1) The ordinary powers of a Sub-divisional Magistrate, being a Magistrate of the first class.
(2) Power to issue search-warrants for documents in custody of Postal or Telegraph authorities, section 96.
(3) Power to discharge persons bound to keep the peace or to be of good behaviour, section 124.
(4) Power to cancel bond for keeping the peace, section 125.
(5) Power to try summarily, section 260.
(6) Power to quash convictions in certain cases, section 350.
(7) Power to hear appeals from orders requiring security for good behaviour, section 406.
(8) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, section 407.
(9) Power to call for records, section 435.
(10) Power to revise orders passed under section 514; section 515.

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* Act X, 1886, s. 19.

SCHEDULE IV.

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED.

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED.	BY THE LOCAL GOVERNMENT.	(1) Power to require security for good behaviour, section 110: (2) Power to make orders as to local nuisances, section 133: (3) Power to make orders prohibiting repetitions of nuisances, section 143: (4) Power to make orders under section 144: (5) Power to hold inquests, section 174: (6) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186: (7) Power to take cognizance of offences upon complaint, section 191: (8) Power to take cognizance of offences upon police reports, section 191: (9) Power to take cognizance of offences upon information, section 191: (10) Power to try summarily, section 260: (11) Power to hear appeals from convictions by Magistrates of the second and third classes, section 407: (12) Power to sell property alleged or suspected to have been stolen, &c., section 524.
	BY THE DISTRICT MAGISTRATE.	(1) Power to make orders prohibiting repetitions of nuisances, section 143: (2) Power to make orders under section 144: (3) Power to hold inquests, section 174: (4) Power to take cognizance of offences upon complaint, section 191: (5) Power to take cognizance of offences upon police reports, section 191: (6) Power to transfer cases, section 192.

POWERS WITH WHICH A MAGISTRATE OF THE SECOND CLASS MAY BE INVESTED.	BY THE LOCAL GOVERNMENT.	(1) Power to pass sentences of whipping, section 32: (2) Power to make orders prohibiting repetitions of nuisances, section 143. (3) Power to make orders under section 144. (4) Power to hold inquests, section 174: (5) Power to take cognizance of offences upon complaint, section 191: (6) Power to take cognizance of offences upon police reports, section 191: (7) Power to take cognizance of offences upon information, section 191: (8) Power to commit for trial, section 206.
	BY THE DISTRICT MAGISTRATE.	(1) Power to make orders prohibiting repetitions of nuisances, section 143: (2) Power to make orders under section 144: (3) Power to hold inquests, section 174: (4) Power to take cognizance of offences upon complaint, section 191: (5) Power to make cognizance of offences upon police reports, section 191:
POWERS WITH WHICH A MAGISTRATE OF THE THIRD CLASS MAY BE INVESTED.	BY THE LOCAL GOVERNMENT	(1) Power to make orders prohibiting repetitions of nuisances, section 143: (2) Power to make orders under section 144: (3) Power to hold inquests, section 174: (4) Power to take cognizance of offences upon complaint, section 191; (5) Power to take cognizance of offences upon police reports, section 191: (6) Power to commit for trial, section 206.

POWERS WITH WHICH A MAGISTRATE OF THE THIRD CLASS MAY BE INVESTED.	BY THE DISTRICT MAGISTRATE	(1) Power to make orders prohibiting repetitions of nuisances, section 143: (2) Power to make orders under section 144: (3) Power to hold inquests, section 174: (4) Power to take cognizance of offences upon complaint, section 191: (5) Power to take cognizance of offences upon police reports, section 191.
POWERS WITH WHICH A SUB-DIVISIONAL MAGISTRATE MAY BE INVESTED.	BY THE LOCAL GOVERNMENT	Power to call for records, section 435.

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